SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 10

ALEXANDESUS BELLASKUS, PETITIONER,

vs.

L. D. CROSSMAN, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. a] [Caption omitted]

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Ex Parte Alexandesus Bellaskus

Civil Action No. 2189

Appellant's Designation of Contents of Record on Appeal—Filed September 12, 1946

Appellant, Alexandesus Bellaskus, designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Application for Writs of Habeas Corpus with Court's Show Cause Order Attached.
2. Respondent's return.
3. The complete transcript of the evidence, two copies of which are filed herewith.
4. Final Judgment.
5. Notice of Appeal.
6. This designation.

Charles H. Sherman, Jr., of Counsel for Appellant, Alexandesus Bellaskus, 2201 Second Nat'l Bank Bldg., Houston 2, Texas.

[fol. 2] Certificate of Service

I, Charles H. Sherman, Jr., do hereby certify that a true copy of the foregoing designation has been served upon Respondent by personally delivering same to the offices of Brian S. Odem, United States Attorney for the Southern District of Texas, Houston, Texas, Attorney for L. D. Crossman, Officer in Charge of the United States Immigration and Naturalization Service, Respondent.

Charles H. Sherman, Jr., of Counsel for Appellant.

IN UNITED STATES DISTRICT COURT

APPELLEE'S DESIGNATION OF RECORD ON APPEAL—Filed September 17, 1946

To the Clerk of the District Court of the United States for the Southern District of Texas, Houston Division:

Appellee hereby designates the following matters to be included in and added to the record on appeal in this cause:

1. All docket entries.

2. Warrant for deportation of Alien No. 55897/31 dated October 25, 1935, attached to Respondent's return and denominated Exhibit "A".

3. Findings of Fact, Conclusions of Law and Opinion of Honorable T. M. Kennerly, United States District Judge in and for the Southern District of Texas, dated Decem-
[fol. 3] ber 4, 1939, in Civil Action Number 223, Houston Division, Ex Parte Alexandrus Bellasakus (Alex Bell), and Order thereon dated December 5, 1939, by Honorable T. M. Kennerly, United States District Judge, which Finding of Fact, Conclusions of Law and Opinion thereon, and Order upon said Opinion were attached to Respondent's return as Exhibit "B".

4. This Designation of additional portions of the record on appeal showing the date of service of a copy hereof upon counsel for Appellant.

It is requested that the record on appeal be prepared as required by law and the rules of this Court, the rules of the United States Circuit Court of Appeals for the Fifth Circuit, and the Rules of Civil Procedure for District Courts of the United States, and that it be filed in the proper office of the Clerk of said Circuit Court of Appeals for the Fifth Circuit.

Brian S. Odem, United States Attorney, by Joseph W. Cash, Assistant United States Attorney, Attorneys for Respondent-Appellee.

This is to certify that a copy of the foregoing Designation by Appellee of Additional Portions of Record on Appeal was served upon Honorable Charles H. Sherman, Jr., 2201 Second National Bank Building, Houston (2), Texas,

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and Honorable Charles F. Tucker, Sterling Building, Houston, Texas, Attorneys of Record for Appellant herein, by depositing a full, true and correct copy of said Designation by Appellee of Additional Portions of Record on Appeal [fol. 4] in the United States Mails, postage prepaid, on the 17th day of September, 1946, addressed to the said Honorable Charles H. Sherman, Jr., and the said Honorable Charles F. Tucker at their last known address designated above.

Joseph W. Cash, Assistant United States Attorney.

[Caption omitted]

In the District Court of the United States for the Southern District of Texas, Holding Sessions at Houston

Civil Action No. 2189

Ex Parte Alexandrus Bellasakus, Alias Alex Bell

Docket Entries

May 20, 1946. Petition for Writ of Habeas Corpus filed in Duplicate.

May 20, 1946. Order to Show Cause filed.

[fol. 5] May 20, 1946. Writ to Serve Copy with Certified copy of above Show Cause Order issued for service on L. D. Crossman, Inspector of Immigration and Naturalization Service issued and delivered to Marshal.

May 21, 1946. Motion to Dismiss and Answer of L. D. Crossman filed in Duplicate.

May 21, 1946. Order Dismissing Writ of Habeas Corpus and Remanding Petitioner to Custody of Immigration Officials filed and entered.

May 24, 1946. Reporters Transcript of Proceedings filed.

May 24, 1946. Writ to Serve copy returned and filed (executed 5/21/46 by delivering to L. D. Crossman, Inspector Immigration and Naturalization Service).

June 4, 1946. Reporter's Stenographic Note Book No. 15 (McAtee) filed.

Aug. 19, 1946. Notice of Appeal filed.

Aug. 19, 1946. Copy of Notice of Appeal mailed to U. S. Attorney.

Aug. 19, 1946. Bond on Appeal ($250.00) Fidelity & Deposit Company of Maryland, Surety, filed and recorded.

Sept. 12, 1946. Appellant's Transcript of Proceedings filed in duplicate.

Sept. 17, 1946. Appellees Designation of Contents of Record filed.

[fol. 6] IN UNITED STATES DISTRICT COURT

APPLICATION OF WRIT OF HABEAS CORPUS—Filed May 20, 1946

To the Honorable Judge of Said Court:

Comes now Alexandrus Bellasakus, alias Alex Bell, Petitioner in the above entitled and numbered cause, and files this his Petition for a Writ of Habeas Corpus, complaining of the Honorable L. D. Crossman, Inspector in Charge, Immigration and Naturalization Service, United States Department of Justice, Federal Building, Houston, Texas, and the Commissioner of Immigration and Naturalization, United States Department of Justice, Franklin Trust Building, Philadelphia, Pa., hereinafter called respondents, and would respectfully show unto this Honorable Court:

1. That your Petitioner was taken into custody by respondents at 11:30 A. M. on the 20th day of May, 1946, and has been informed that he will be placed on a train and removed from Houston, Texas, to New York City, New York, for deportation to Greece; that he in actual custody of said respondents, and that said respondents will remove petitioner from the jurisdiction of this Court unless restrained from so doing by the writ of this Honorable Court;

2. That such restraint and confinement are unlawful and are contrary to the Constitution and Laws of the United States of America.

[fol. 7] 3. That the only authority for his deportation from the United States, is a warrant of Deportation dated October 25, 1935, wherein Petitioner is ordered deported to Greece;

4. That Petitioner was not accorded a fair hearing by the Immigration and Naturalization Service, and that the said Warrant of Deportation is void, ab initio;

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5. That there is no evidence to sustain said Warrant of Deportation, and that the same is void and has no force and effect at this time;

6. That the issuance of said Warrant of Deportation constitutes an abuse of discretion, and that such action is arbitrary and capricious, and the Immigration Officers have applied erroneous construction of Law;

7. That the said Warrant of Deportation, dated October 25, 1935, has no force and effect at this time, and is void for the reason that it has expired by operation of law;

8. That the Immigration Inspector conducted a hearing in this case and made a finding of fact that your petitioner was born in Turkey; immigrated to the United States from Turkey, and was a citizen and subject of Turkey, and that there is, therefore, no authority under the law for his removal from the United States to Greece, as he is not a citizen of such country, has no relatives or business interest there, and has never heretofore been to Greece.

Wherefore, premises considered, your petitioner prays that this Honorable Court grant and issue a Writ of Habeas Corpus forthwith, demanding Honorable L. D. Crossman, one of the respondents herein, or any other [fol. 8] officer having custody of said petitioner, to produce him in person before your Honorable Court and to show cause, if any he has, why he should not be restrained and enjoined from removing said petitioner from the jurisdiction of this Court, and restrained from deporting petitioner from the United States to Greece, and to show cause why said petitioner should not be released from said unlawful restraint and confinement, and that pending final decision petitioner be released upon Appearance Bond in a reasonable sum, to guarantee his appearance Instanter, and that respondents produce before this Honorable Court a certified and proper authenticated record of the proceedings before the Immigration and Naturalization Service in this case.

Alex Bell, Petitioner. Charles H. Sherman, Jr., C. F. Tucker, Attorneys for Petitioner.

Duly sworn to by Alex Bell. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—Filed May 20, 1946

Upon the petitioner making necessary arrangements with respect to the costs of Court, the Clerk of the Court will file this petition for Writ of Habeas Corpus, and hearing of said matter is set for the 21st day of May, 1946, at 10 o'clock a. m., in the District Court of the United States of America, for the Southern District of Texas, at Houston, Texas, at which time Respondent, Honorable L. D. Crossman, is required to produce the Petitioner, Alexandrus Bellasakus, alias Alex Bell, and also a properly authenticated record of the proceedings in this case before the Immigration and Naturalization Service, and to show cause, if any he can, why the Writ of Habeas Corpus should not issue.

The Clerk of the Court will issue, and the Marshal will serve all necessary processes.

Done this 20th day of May, 1946.

(S.) Allen B. Hannay, Judge of the United States District Court, for the Southern District of Texas, at Houston, Texas.

[fol. 10] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS AND ANSWER OF RESPONDENT, L. D. CROSSMAN—Filed May 21, 1946

Now comes L. D. Crossman, Officer in Charge, Immigration and Naturalization Service, and moves the Court to dismiss the petition filed herein for the following reasons:

I

That said application does not allege facts sufficient upon which to base action of this Court, but constitutes solely conclusions of the Petitioner.

Wherefore, respondent prays that petitioner for writ of habeas corpus be dismissed.

L. D. Crossman, Officer in Charge, Immigration and Naturalization Service, Houston, Texas.

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Respondent, without waiving the foregoing motion to dismiss, makes further answer and says that he is holding the petitioner under a warrant of deportation issued by the Assistant to the Secretary of Labor on October 25, 1935, a copy of which is attached hereto and marked Exhibit "A", and made a part hereof.

That said warrant of deportation was issued following a full and fair hearing, held in accordance with law, and in accordance with the regulations of the Secretary of Labor, [fol. 11] before an authorized Immigrant Inspector, and at which hearing petitioner was represented by counsel, to-wit: the Honorable Julian A. Weslow, an attorney at law, of Houston, Texas, and was offered the opportunity to cross-examine any and all of the witnesses produced at said hearing; that at the conclusion of such hearing said officer found that petitioner is subject to deportation, under Section 19 of the Immigration Act of February 5, 1917, in that, said petitioner has been found managing a music and dance hall, and resort, habitually frequented by prostitutes and where prostitutes gather.

Upon full and due consideration of the facts adduced upon said hearing, the Assistant to the Secretary of Labor issued the warrant of deportation aforesaid.

Respondent further alleges, that on December 5, 1939, Honorable T. M. Kennerly, District Judge, entered his order dismissing application for writ of habeas corpus filed herein by *respondent* on December 2, 1939, in Civil Action 223, Houston Division, Southern District of Texas, remanding petitioner to the Immigration and Naturalization Service at Houston, Texas, for deportation in accordance with the warrant of deportation referred to, a copy of said order being attached hereto and marked Exhibit "B", and the opinion of the Court being referred to and made a part hereof.

Wherefore, respondent prays that he be discharged from the Court's order, and that petitioner be remanded to his custody, that the warrant of deportation aforesaid may be executed.

L. D. Crossman, Officer in Charge, Immigration and Naturalization Service, Houston, Texas, Respondent.

[fol. 12] EXHIBIT "A"

Warrant—Deportation of Alien

2923-7463

United States of America, Department of Labor,
Washington

No. 55897/31

To District Director of Immigration and Naturalization, Galveston, Texas, or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, from proofs submitted to me, Assistant to the Secretary, after due hearing before an authorized immigrant inspector, I have become satisfied that the alien Alexandrus Bellasakus, alias Alex Bell, who entered the United States at New York, N. Y., ex SS. "Alice" on the 15th day of Nov. 1909, is subject to deportation, under Section 19 of the immigration Act of February 5, 1917, being subject thereto under the following provisions of the laws of the United States, to wit: The Act of 1917, in that he has been found managing a music and dance hall and other place of amusement and resort, habitually frequented by prostitutes and where prostitutes gather.

I, Turner W. Battle, Assistant to the Secretary of Labor, by virtue of the power and authority vested in me, by and under the laws of the United States, do hereby command you to deport the said alien to Greece, at the expense of the appropriation "Salaries and Expenses, Immigration and Naturalization Service 1936", including the expenses of an attendant, if necessary. Delivery of the alien and acceptance for deportation will serve to cancel the outstanding appearance bond.

[fol. 13] For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 25th day of October, 1935.

(S.) Turner W. Battle, Assistant to the Secretary of Labor.

A True Copy I certify. Attest:

L. D. Crossman, Inspector in Charge.

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EXHIBIT "B"

Office File 35651

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 223

Ex Parte: ALEXANDRUS BELLASAKUS alias Alex Bell

The Petition and Writ of Habeas Corpus obtained on behalf of Alexandrus Bellasakus, alias Alex Bell, on the twenty-ninth day of November, A. D. 1939, having come on to be heard before this Court, on the fourth day of December, A. D. 1939; and after hearing John F. Shea, Attorney for the petitioner, in support of the writ and Miles L. Moss, Assistant United States Attorney, in opposition thereto, upon the petition for the writ of habeas corpus and respondent's report thereto, and the evidence introduced at the hearing of this cause;

[fol. 14] It is Ordered that the said Writ of habeas corpus, be and the same is hereby, dismissed, and the petitioner is remanded to the custody of L. D. Crossman, Inspector in Charge, United States Immigration and Naturalization Service, at Houston, Texas, for deportation, in accordance with the provisions of the warrant of deportation held by said Immigrant Inspector.

Done at Houston, Texas, this 5 day of December, A. D. 1939.

T. M. Kennerly, United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

C. A. 223

Ex Parte: ALEXANDRUS BELLASAKUS (Alex Bell)

John F. Shea, of Houston, Texas, for Petitioner.

Douglas W. McGregor, U. S. District Attorney, and Miles L. Moss, Assistant U. S. District Attorney of Houston, Texas, for United States of America.

December 4, 1939

Memorandum:

A Warrant of Deportation having been issued by the Secretary of Labor October 25, 1935, for the deportation of Alexandrus Bellasakus, alias Alex Bell (for brevity called Petitioner) charging that:

[fol. 15] "he has been found managing a music and dance hall and other place of amusements and resort, habitually frequented by prostitutes and where prostitutes gather"

he petitions for the Writ of Habeas Corpus.

The place is the Atlantic Cafe and Night Club, located on the corner of Congress and Chartress Streets in the City of Houston, Texas. In one room, there was a dance hall and place for the sale of beer, and in the other and adjoining room, a cafe or restaurant. There was a large double door between the rooms. That the place was a resort habitually frequented by prostitutes and where prostitutes gather is perfectly clear from the record. That Petitioner was there every day both in the dance hall and in the restaurant, aiding in carrying on the business is likewise clear.

1. Petitioner claims that the record and the evidence which Petitioner brought before the Court, show he owned no interest in the dance hall, but only owned the restaurant or an interest in the restaurant. This was one of the issues before the Immigration Authorities. Petitioner's early statements do not support this view. His later statements—and his statements at this trial do support this view.

An issue of fact was presented which has been decided adversely to Petitioner by the Immigration Authorities and which this Court may not review.

2. Petitioner also claims that he did not have a fair trial before the Immigration Authorities. A careful examination of the record discloses that this is not true. [fol. 16] He was represented by counsel, had a full hearing, and a careful examination of the record discloses that all his rights were carefully preserved.

3. Petitioner also claims that the evidence is not sufficient to support the Warrant of Deportation, and that he,

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under the Law, cannot be deported upon the facts found by the Immigration Authorities. This view cannot be supported.

See Lindsey v. Dobra, 62 Fed. (2d) 116.

From what has been said, it follows that the Writ of Habeas Corpus should be denied, and Petitioner remanded to the custody of the Immigration Authorities.

Let an Order be drawn and presented accordingly.

(S.) T. M. Kennerly, Judge.

* * * * * * *

[fol. 17] In the District Court of the United States for the Southern District of Texas, Houston Division

Civil Action No. 2189

Ex Parte Alexandesus Bellaskus

Transcript of Evidence and Proceedings—Filed September 12, 1946

Appearances:

For the Petitioner: Charles F. Tucker, Esq., Charles H. Sherman, Esq.

For the Respondent: Joseph C. Cash, Esq.

Proceedings

The Court: All right, gentlemen. What is the status of this habeas corpus? Are both sides ready?

Mr. Cash: If the Court please, I saw a copy of the petition, or the order to show cause, I mean, only this morning, and I immediately dictated a return to it. Our office staff, however, is a little short right now, and it is not ready, but it will be in about thirty minutes. Otherwise, the Government is ready, and wishes to go forward at this time. That is, if we may have a continuance for about thirty minutes in order to get the pleadings in.

The Court: Do you want to see the pleadings before you go forward?

[fol. 18] Mr. Cash: I have seen the application, Your Honor, but have not yet filed the return.

The Court: I mean do they want to see your pleadings before they proceed?

Mr. Tucker: Yes, Your Honor.

Now, Your Honor, the Court in its fiat, ordered the production of the record of the proceedings that have been had, Your Honor, before the Immigration and Naturalization Service, and Mr. Sherman and I have alleged in our petition that the hearing was unfair, that there was no evidence to sustain the warrant of deportation, and we believe, Your Honor, that the record should be before this Court.

The Court: Where are the records, Mr. Cash?

Mr. Cash: If the Court please, I saw that the Court had ordered this certified copy to be before the Court, and that is customary, but I would be willing to go forward without bringing it down here, and I don't think the Court needs it, for the simple reason that this entire record has been heretofore before Judge Kennerly, and he gave this man a full, fair and complete hearing, and at that time issued an order remanding this man back to the custody of the Immigration and Naturalization Service for deportation in 1939.

The Court: When was that hearing held?

[fol. 19] Mr. Cash: On December 3rd, 1939, Civil Action 223, Houston Division. I have the file coming in now. I didn't mean to go into that until we got into the case, but this whole proceeding is res judicata, if the Court please, and has already been passed on by Judge Kennerly. I didn't intend to bring that up at this time, but——

The Court: If that is the case, we can stay the proceedings until Judge Kennerly returns. Mr. Clerk, do you know where Judge Kennerly can be reached? I am not familiar with his schedule. Is he to be in Galveston next week?

The Clerk: No, sir, he is enroute to New Orleans.

The Court: I mean next week.

The Clerk: Oh, June 3rd he will be in Galveston. He is here next week.

The Court: Well, since he has already passed on this matter,—that is the first information I had on that——

Mr. Cash: Of course it is a closed case, Your Honor.

The Court: I am wondering if we could not make some arrangement—where is the petitioner? Which one is he?

[fol. 20] Mr. Tucker: Right here, Your Honor, Alexander Bell.

The Court: Is that him?

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Mr. Tucker: Yes, sir.

The Court: I was wondering if we could make some arrangement whereby it could be tried before Judge Kennerly, or hold off at least until I have a chance to see whether that is what he wants. I wouldn't want to take it away from him.

Mr. Cash: Well, it is a final decision, Your Honor.

The Court: I wouldn't have in mind what was in his mind. It would be impossible for us to ascertain what was in his mind without having him testify. I think it would be a lot better to have him try the law suit.

Mr. Cash: Well, as I see it, Your Honor,—of course, if that is what the Court wishes to do, that will be the ruling, but as I see it, the original habeas corpus hearing was had, and he heard evidence, and wrote an opinion on it which is a part of the record of this Court, and it is a final opinion.

The Court: Were you familiar with that, Mr. Sherman?

[fol. 21] Mr. Sherman: Only to the extent, Your Honor, that I understood that a hearing was had. However, my understanding is that it was not a full, final and complete hearing.

The Court: Have you read the opinion?

Mr. Sherman: No, sir, I have not read it.

Mr. Cash: The opinion itself is about two pages long, Your Honor, and goes very fully into the facts, and shows that the hearing was fair, and Judge Kennerly had everything before him, and the reason I am insisting, in a way, if it may be called that, that it be heard here at this time, or passed on at this time, is the fact that we have these deportation trains for parties going over the country, as Your Honor knows——

The Court: Don't they take them pretty often now? How often do they come?

Immigration Agent L. D. Crossman: At the present time they are irregular. Before the war, they used to be one about every six weeks, but the last one we had was in January, and that is about five months ago, but since shipping is becoming available again, I imagine they will run more often.

The Court: Well, how long—this man was ordered deported in 1939, and he has not been deported yet. Why was that?

[fol. 22] Mr. Tucker: '35, Your Honor.

The Court: '35?

Mr. Tucker: Yes, Your Honor.

The Court: Let the man answer the question. I asked him.

Mr. Tucker: I beg your pardon.

Immigration Agent Crossman: The reason for that delay was that in 1939, when he was returned to our custody, we were unable to get a passport to Greece, but now they can be deported without passports to Greece, and it was held up for that sole reason, Your Honor.

The Court: Eleven years?

Immigration Agent Crossman: The passport facilities were not such as he could be deported at that time.

The Court: It has been held up for eleven years?

Immigration Agent Crossman: Yes, sir.

[fol. 23] The Court: Has he been out on bond, or what has been his status?

Immigration Agent Crossman: He has been out on bond, and has been taken into custody two or three times ready for deportation, and one time we had the habeas corpus, another time he got a postponement by the central office, and the last time, which was in last January, another stay was made to give him an opportunity to have the case presented, for the purpose of considering a motion for reopening.

The Court: What happened to that?

Immigration Agent Crossman: It was denied, and we received notice on it last week.

The Court: The petition to reopen was denied?

Immigration Agent Crossman: Yes, sir.

Mr. Cash: If the Court please, we can get that copy of Judge Kennerly's opinion and the entire clerk's file, and the opinion is only about two pages long.

The Court: Well, you get this other in, and I will come back on the bench about 11:00 and see what the situation is. I have another matter at 10:30 that should not take over thirty minutes, in my office, so I will recess again until 11:00 o'clock.

[fol. 24] (Recess at 10:15 a. m. until 11:00 o'clock a. m., May 21st, 1946, at which time the following proceedings took place herein.)

The Court: Have you filed your answer?

Mr. Cash: Yes, I have, Your Honor.

The Court: All right.

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Mr. Cash: If the Court please, I made reference as an exhibit in the pleading there to the copy of the opinion of Judge Kennerly, but I didn't have it copied, I didn't have time to have it copied, so, if the Court please, I will present it to the Court as a part of the exhibit, or as an exhibit to the pleading, just as though it were attached to the return itself.

The Court: Very well.

I have read the things that are before me. What is your answer to that, Mr. Sherman and Mr. Tucker? Have you read these matters?

Mr. Tucker: Your Honor, it is our position that we have raised at least two new issues in this proceeding that were not before Judge Kennerly on the previous petition or writ of habeas corpus in 1939 and they are, Your Honor, we allege in our petition that the issuance of this warrant of deportation constitutes an abuse of discretion, and that such action upon the part of the defendant Secretary of [fol. 25] Labor, who issued this warrant in 1935, was arbitrary and capricious, and that the immigration officers had applied an erroneous construction of the law in this case. We take the position also in paragraph 7 of our petition, Your Honor, that the warrant of deportation, dated October 25th, 1935, has expired by operation of law, it being eleven years old, and we take the position——

The Court: Well, what is the law on that, or is there any limitation as to the time?

Mr. Tucker: Your Honor, there are some cases that we would like to present later on that question.

The Court: That is the only point that gives me any pause at all, because I am not going to overrule Judge Kennerly. I don't have that authority, in the first place.

Mr. Tucker: Your Honor, may I state our third additional ground that we have raised?

The Court: I thought you said you had two, but go ahead.

Mr. Tucker: The other ground we raised is that the immigration inspector who conducted a hearing in this case in 1935 made a finding of fact that the petitioner in this case was born in Turkey; that he immigrated to the United States from Turkey, and that he was a citizen and subject of Turkey, and therefore we take the position that there is no authority under the law for his removal to Greece, which [fol. 26] is the country named in the warrant of deportation. We will endeavor to show, Your Honor, that the petitioner

has never been in Greece; that all of his relatives are in Turkey, and he has been in this country since 1909, and we expect to endeavor to show the Court that the petitioner was transferred, after His Honor, Judge Kennerly, ruled in the previous writ of habeas corpus case that he had a fair hearing, and there was sufficient evidence, that they transported him to New Orleans, and took him before the Greek Consul in that city, and asked him to take an oath of allegiance to Greece, so he would become a citizen of such country, and that he declined to do so.

Those, Your Honor, are the additional grounds that we have raised, which we respectfully submit to the Court were not before the Court in the previous petition.

The Court: Well, it is my opinion that the only thing I can or should go into is the question of the invalidity of the deportation warrant by reason of the passage of time. In other words, eleven years, or whatever it is. That is the only feature that I would hear you on at all.

Mr. Sherman: If the Court please, I would like to say one further word. We have alleged that the commissioner applied an erroneous construction of law, and I believe that it shows it on its face, in view of a case that we have here.

The Court: You mean that is previous to Judge Kennerly's hearing in '39?

Mr. Sherman: This case was previous to that time.

[fol. 27] The Court: I am talking about——

Mr. Sherman: This issue was not raised before.

The Court: That doesn't make any difference. It should have been raised, and they had counsel both at the hearing —both at the hearing before Judge Kennerly and at the hearing before the commissioner.

Mr. Sherman: I think it should have been raised too, Your Honor, but it is our contention that if it — so fundamental that the order is void, that it can be raised at any time.

The Court: I am not going to overrule another District Judge, because of the fact that the books are full of decisions you can't do that, and I am not going to try to.

Mr. Tucker: Your Honor, there is one other thing I would like to respectfully invite the Court's attention to, and we wish to ask that this be done to preserve the record if an appeal should be taken in this case.

The Court: Go ahead.

Mr. Tucker: Your Honor ordered—that is, we prayed

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for in our petition that a duly authenticated certified copy of the record of the proceedings had before the Immigration and Naturalization Service in 1935, we asked the Court to [fol. 28] require the production of that record here in Court, and the Court so ordered——

The Court: If you had told me the full facts, or if your petition had disclosed the full facts, I would not have made that order.

Mr. Tucker: Well, Your Honor——

The Court: In view of Judge Kennerly's holding that this proceeding was fair, I would not have gone into that at all, in view of his opinion on that point. I am foreclosed from doing that.

Mr. Tucker: Your Honor, the order of Your Honor does require the production of that record here——

STATEMENT BY THE COURT

The Court: That order was made on the assumption that you had told me all of the material facts in your petition, and you left that out. I would not have made it if I had had that information before me, that Judge Kennerly had already passed on this question and had held that the petitioner had had a fair trial, or hearing.

"The petitioner also claims he did not have a fair trial before the Immigration Authorities. A careful examination of the record"—which is the record you are asking for—"discloses that this is not true. He was represented by counsel, had a full hearing, and a careful examination of the record"—that is a careful examination of the record by Judge Kennerly—"discloses that all of his rights were carefully preserved.

[fol. 29] "Petitioner also claims that the evidence is not sufficient to support the warrant of deportation, and that he, under the law, cannot be deported upon the facts found by the Immigration Authorities. This view cannot be supported. From what has been said, it follows that the writ of habeas corpus should be denied and the petitioner remanded to the custody of the Immigration Authorities. Let an order be drawn and presented accordingly."

COLLOQUY

Mr. Tucker: Your Honor, at this time I make a motion that the Immigration Service be required to produce the

record, the duly certified and authenticated record of the central office of the Immigration and Naturalization Service at Philadelphia, as they have been ordered to do by the Court.

The Court: For the reason that Judge Kennerly has already passed on that question or that feature of this case, I refuse.

Mr. Tucker: I accept, Your Honor, respectfully.

The Court: All right. Now I will hear from you on the question of time.

Mr. Cash: I believe that is the only question in the case, Your Honor, and in the short time allot-ed to me I have found some cases where this same question has been brought up, and, as Your Honor knows, where aliens are concerned, the Department of Labor, which was the predecessor department to the department having control over aliens in this country, deportation and admissions, before it came under [fol. 30] the control of the Department of Justice, they had extensive regulations regarding the handling of aliens prior to deportation, and it is not unusual to find that many of these aliens, after having exhausted the administrative remedies, and having secured one delay after another, finally resort to the Courts for habeas corpus, and I have two cases here where several years elapsed, and another where there was eleven years which elapsed between the issuance of the warrant and the hearing on the application for a writ of habeas corpus, and the Courts have held that time has no relation whatever to the execution of the warrant; that the facts to be considered are the facts behind the issuance of a warrant, and just because a man can stave off by his own efforts, or the incidents of a war, or something of that sort, that does not affect the right of the Attorney General to get him back to the country where he is supposed to go.

I would like to read one excerpt from one case, Your Honor——

The Court: Go ahead.

Mr. Cash: In the case of Seif versus Nagle, 14 Federal 2nd 416, the Court stated as follows:

"It is urged that the Secretary of Labor and Commissioner of Immigration have waived the right to deport in that they have waited an unreasonable time after the Department of Labor assumed jurisdiction of the detained.

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We find no merit in the point. When the original order of 1914 was made directing deportation to Austria, because of the war the alien could not have been deported to that country. Since the war, even as late as 1924, the alien himself has exerted efforts to prevent deportation and has been [fol. 31] successful in obtaining several stays. But in August, 1925, the Government of Poland issued the necessary passport. No sufficient reason appears for issuing judicial process that will prevent carrying out the order of deportation."

Now, there is a recent District Court case in California, where Judge St. Sure, of course, handles many of those immigration cases one the West Coast. He says—well, I will just read on the head notes for the gist of the holding:

"Where, at time of issuance of original deportation warrant it was impossible to deport Russian alien, who was then at liberty for several years before being re-arrested under original warrant for purposes of deportation because of continuation of activities in the Communist party, the Attorney General was allowed broad discretion in finding ways and means of executing the original deportation warrant."

The Court says:

"Attention is called to the fact that petitioner has been available for deportation for a period in excess of ten years. It is urged that the old warrant has become functus officio because it was not executed within a reasonable time. Until recently taken into custody petitioner was not restrained of his liberty."

The Court then quotes, " 'Surely there is nothing in this case showing that the delay in deporting the petitioner work a disadvantage to him. If anything, he profited by it.' During a part of the time diplomatic relations did not exist between the United States and the Soviet Republics and deportation of aliens was therefore impossible. [fol. 32] The Attorney General now represents that he has 'reason to believe that deportation of petitioner can be effected.' The return further shows 'that petitioner has, subsequent to the 5th day of December, 1930, persisted in a flagrant manner in * * * membership * * * activities and is a high official in * * * the Communist Party in the United States of America.' "

And then it goes on to a question of certain evidence. Your Honor, there is no statute of limitation on deporting an undersirable alien. This matter has been before Judge Kennerly several times. It was before him in the Beaumont case, that was transfererd here for trial, and in some other cases as well, but I have not had time to go into it very fully. However, these cases are representative of the fact that you look to what happened behind the warrant of deportation. If the proceedings were fair and issued upon some testimony, the fact that an alien will come in and give testimony possibly different from what he did is not important, because Congress has given the Attorney General the final say in matters of fact, and this Court passes on the fairness of it, which this Court has done, through Judge Kennerly, and I ask, in the state of the record, I ask that this man be remanded to the Immigration and Naturalization Service in accordance with the original warrant issued in 1935.

Mr. Sherman: If Your Honor please, before Mr. Tucker makes his argument for the sake of the record, do I understand that you overrule our attempt to introduce evidence as to Item Number 6 in our petition, and Item Number 8?

The Court: 6 and 8?

[fol. 33] Mr. Sherman: Yes, sir. That is where we have alleged that the Immigration officers applied an erroneous conclusion of law, which matter was not raised in the prior hearing, and Item 8 is that the petitioner was born in Turkey, and the order shows on its face that they are about to deport him to Greece.

Mr. Cash: May I say there, Your Honor, that both of those involve mere conclusions of law and not statements of fact, and it is a matter that could have been brought up in the previous trial if they were to be considered. As a matter of fact, both of them are inherent in the record, and they were in the file at the time Judge Kennerly rendered his ruling.

The Court: The only point I want to hear anything on is the law with reference to the passage of time, and as to it being a bar to the enforcement of the deportation.

Mr. Sherman: May we have our exception, Your Honor?

The Court: Yes, sir.

Mr. Tucker: Your Honor, I am really not prepared to present some of the decisions I had in mind on that subject that the Court has expressed an interest in, that is the expiration of this warrant. There is a decision by Judge

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Hann that I do not have available here, because I did not think I would be called upon to argue that point this morn-
[fol. 34] ing, and I would like time to look into that case further and present it to Your Honor in writing or brief form.

The decisions I have at hand, Your Honor, one case I think is very interesting upon this point, and that is the case of Saganaski versus Weeden. It was decided October 19th, 1931, by the Circuit Court of Appeals for the Ninth Circuit. The citation is 53 Federal 2nd 13. The Court held—I believe that decision was not in Seattle, Washington,—and the Court held that if for any reason order and deportation warrant cannot be carried into effect, alien must be discharged from custody.

I would much prefer to present that fully to Your Honor, because, as I say, I had not expected to be called upon to argue the law at this time. I thought we would go into the trial of this case on its merits. However, the Court said in that case, "Applicant contends"——

The Court: On that point, didn't you know this ruling of Judge Kennerly?

Mr. Tucker: Yes, Your Honor, I read the petition.

The Court: Have you read it?

Mr. Tucker: I read the petition of the previous attorney, the attorney on the previous hearing.

The Court: Did you read the opinion?

Mr. Tucker: No, Your Honor, I had not read the opinion
[fol. 35] in this case. I merely read the petition, and I noticed in the petition by the previous attorney that there was no allegation in the petition that there was not evidence to support the finding of the Secretary, and that there was no allegation in there as to the fact that they were endeavoring to deport the petitioner to Greece, instead of to Turkey. I knew fully of the petition, and I knew that that case had been decided about six years ago, and I knew also, Your Honor, that subsequent to Judge Kennerly's decision in this case,—and I can establish it,—that the Immigration Service ordered Bell to report to New Orleans to take the oath——

The Court: Well, let's get back to the law.

Mr. Tucker: Yes, Your Honor.

The Court: Don't testify. Let's get back to the law.

Mr. Tucker: I will, Your Honor. That is one case that we respectfully submit to the Court. It was stated in that case, that applicant contends it is the purpose of the Immigra-

tion officers to deport him to Russia via Shanghai, and it appears from the record that the suggestion was made that the applicant be deported from the Port of Seattle to Shanghai, with provisions for retail transportation from that port to Russian territory. The warrant itself provides that the alien be sent to Russia. The former course is not warranted by the facts or the law. To convey petitioner to Shanghai and there release or discharge him would in no sense satisfy the law nor carry into effect the order of deportation. This Court cannot sanction such a course, and [fol. 36] we would not assume it would be pursued. The Secretary of Labor has found, and we think correctly so, that the petitioner should be deported to Russia. If for any reason this order cannot be carried into effect, the petitioner should be discharged from custody."

The Court: Well, here, as I understand it, there isn't any question but that he can be deported to Greece, or Turkey, or whichever——

Mr. Cash: That is correct, Your Honor.

Mr. Tucker: We contend that it cannot be done legally, Your Honor, and we have some cases on that point, if the Court would care to hear them.

The Court: The only one I want to hear about is on the question of time.

Mr. Tucker: That is our one case, Your Honor, and here is a case of Browder versus Johnson, in the District Court of Maryland—no, Massachusetts. I beg your pardon. 5th Federal 2nd 238. "Alien ordered deported cannot be imprisoned indefinitely pending recognition of Soviet Government by United States, because of inability to deport."

The Court: That is a different situation, as I understand it here.

Mr. Tucker: Your Honor, that very issue is in this case, because the man was ordered deported in '35, and they have [fol. 37] actually let him remain here for eleven years to obtain the recognition of Greece, because they contend that this man is a citizen of Greece.

The Court: Wasn't the case you just read me—you, or whoever was representing him could have probably brought that up at a different time, but you can't bring it up now, when they have the place available and the means available.

Mr. Tucker: Your Honor, there is one other case that I wish to cite to the Court, and that is Ex parte Matthews,

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from the Western District of Washington, 277 Federal 875.

That case holds that where an alien has been ordered deported to a certain country, the Government does not have right to hold him indefinitely until some arrangement is made or worked out among the various countries for recognition which would entitle them to effectuate the warrant of deportation.

Then the other case is U. S. versus Ruiz, by the Circuit Court of Appeals of Louisiana, and it is a decision by Judge Foster, of April 22nd, 1911, 186 Federal 602——

The Court: 186——

Mr. Tucker: Yes sir, 186, Your Honor.

The Court: —102?

Mr. Tucker: Just a minute, Your Honor. It is 602, Your Honor.

[fol. 38] The Court: 602?

Mr. Tucker: That is right, Your Honor, 602.

Now, Your Honor, there is one other case I would like to have the privilege of presenting to the Court, by Chief Justice Hann, and I think it is the Circuit Court——

The Court: How long will it take to get it?

Mr. Tucker: I don't know. I think I can have it within thirty minutes. I know the case is in existence, but I just can't put my hand on it.

The Court: Well, go and get it. I will give you thirty minutes. I will give you thirty minutes to get it in. Be back by twelve.

Mr. Tucker: All right, Your Honor.

(After some delay.)

Mr. Tucker: Your Honor, I am going to waive the presentation of that case. I just don't know where it is, and I think I have presented probably all of the authorities that are available.

The Court: All right. I will deny the habeas corpus then. Write me an order on it, Mr. Cash.

[fol. 39] Mr. Cash: Yes, sir.

Mr. Tucker: Your Honor, we wish to respectfully note an exception to Your Honor's ruling, and give notice of appeal to the Circuit Court of Appeals for the Fifth Judicial Circuit.

The Court: All right. I will give you back your papers here.

Court will stand adjourned under the rule.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 2189

Ex Parte ALEXANDRUS BELLASAKUS, Alias Alex Bell

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND REMANDING PETITIONER TO CUSTODY OF IMMIGRATION OFFICIALS—Filed May 21, 1946

On this 21st day of May, A. D. 1946, came on for hearing the petition of Alexandrus Bellasakus, alias Alex Bell, and Order of this Court issued May 20, 1946, requiring L. D. Crossman, Respondent, to produce the petitioner, Alexandrus Bellasakus, alias Alex Bell, and after hearing C. F. Tucker and Charles H. Sherman, Jr., attorneys for [fol. 40] petitioner, in support of the application, and Joseph W. Cash, Assistant United States Attorney, in opposition thereto, upon the petition for the writ of habeas corpus and respondent's return thereto, and the evidence introduced at the hearing of this cause:

It is Ordered that the said writ of habeas corpus be and the same is hereby dismissed, the rule to show cause is discharged, and the petitioner is remanded to the custody of L. D. Crossman, Officer in Charge, United States Immigration and Naturalization Service, at Houston, Texas, for deportation, in accordance with the provisions of the warrant of deportation held by the said L. D. Crossman.

(S.) Allen B. Hannay, United States District Judge.

Done at Houston, Texas, this 21st day of May, A. D. 1946.

JWC/cp.

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IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed August 19, 1946

To the Honorable Judge of Said Court:

Notice is hereby given that Alexandesus Bellaskus, Petitioner in the above numbered and styled Action, hereby [fols. 41-42] Appeals to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, from the final Judgment rendered and entered in this Action on the 21st day of May, A. D. 1946.

Bond for Costs in the sum of Two Hundred Fifty ($250.00) Dollars, conditioned and payable as required by Rule 73-c, is filed herewith.

Dated and filed on this 19th day of August, A. D. 1946.

C. F. Tucker, Attorney for Appellant, Alexandus Bellaskus.

313 Sterling Building, Houston 2, Texas, Fairfax 5641.

Bond on appeal for $250.00 approved and filed August 19, 1946, omitted in printing.

[fol. 43] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 44] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 5, 1947

No. 11786

ALEXANDESUS BELLASKUS

versus

L. D. CROSSMAN, Officer in Charge, United States Immigration and Naturalization Service

On this day this cause was called, and, after argument by Joseph W. Cash, Esq., Assistant United States Attorney, for appellee, was submitted to the Court.

[fol. 45] OPINION OF THE COURT AND DISSENTING OPINION BY SIBLEY, CIRCUIT JUDGE—Filed December 2, 1947

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11786

ALEXANDESUS BELLASKUS, Appellant,

versus

L. D. CROSSMAN, Officer in Charge, United States Immigration and Naturalization Service, Appellee

Appeal from the District Court of the United States for the Southern District of Texas

(December 2, 1947)

Before Sibley, Holmes, and McCord, Circuit Judges

HOLMES, Circuit Judge:

This appeal is from a judgment discharging a writ of habeas corpus, which was issued upon a second petition by appellant, who is now in custody under an order of deporta-

tion to Greece, issued under Section 19 of the Immigration Act of 1917.[1]

[fol. 46] It is admitted that the petitioner is an alien and that he entered the United States in 1909. The warrant for petitioner's deportation was issued, in 1935, after he had been found managing a dance and music hall and other places of amusement and resort habitually frequented by prostitutes. Subsequently, he was taken into custody, but until late in 1939 he was able to secure several delays. Meantime, World War II had commenced in Europe, and the petitioner was still in the United States. After being taken into custody for deportation in 1939, he began habeas corpus proceedings in the court below.[2] After a hearing, wherein counsel appeared with the petitioner, evidence was heard, and the full official Central Office Immigration Record was examined, the court below held that the petitioner had committed the acts as found by the immigration officials and that, as shown by their records, they had carefully preserved all of his rights.[3]

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[1] 39 Stat. 874, c. 29.

[2] The proceedings were had before different judges.

[3] Memorandum of December 4, 1939, by Kennerly, District Judge.

"A Warrant of Deportation having been issued by the Secretary of Labor October 25, 1935, for the deportation of Alexandesus Bellaskus, alias Alex Bell (for brevity called Petitioner) charging that: 'he has been found managing a music and dance hall and other place of amusements and resort, habitually frequented by prostitutes and where prostitutes gather' he petitions for the Writ of Habeas Corpus.

"The place is the Atlantic Cafe and Night Club, located on the corner of Congress and Chartress Streets in the City of Houston, Texas. In one room, there was a dance hall and place for the sale of beer, and in the other and adjoining room, a cafe or restaurant. There was a large double door between the rooms. That the place was a resort habitually frequented by prostitutes and where prostitutes gather is perfectly clear from the record. That Petitioner was there every day both in the dance hall and in the restaurant, aiding in carrying on the business is likewise clear.

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The Immigration Service was unable to obtain a passport to Greece in 1939, and no effort was made to deport the petitioner to Greece during the years of occupation of that [fol. 47] country by the Nazis. In early 1946, the immigration officials took the petitioner into custody for deportation, but their Central Office granted a stay for the purpose of consideration of a motion to reopen the case. Upon the denial of the motion and denial of a further stay, deportation was ordered. At this stage of the case, the present petition was filed, an order to show cause being entered. This order included a requirement that the record of the proceedings before the Immigration and Naturalization Service be produced, but it was not possible for such records to be produced on one day's notice, and they were not produced at the hearing. The Government's return to the show-cause order was a motion to dismiss the petition and an answer which set forth the regularity of the warrant and the lower

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"1. Petitioner claims that the record and the evidence which Petitioner brought before the Court, show he owned no interest in the dance hall, but only owned the restaurant or an interest in the restaurant. This was one of the issues before the Immigration Authorities. Petitioner's early statements do not support this view. His later statements—and his statements at this trial do support this view.

"An issue of fact was presented which has been decided adversely to Petitioner by the Immigration Authorities and which this Court may not review.

"2. Petitioner also claims that he did not have a fair trial before the Immigration Authorities. A careful examination of the record discloses that this is not true. He was represented by counsel, had a full hearing, and a careful examination of the record discloses that all his rights were carefully preserved.

"3. Petitioner also claims that the evidence is not sufficient to support the Warrant of Deportation, and that he, under the Law, cannot be deported upon the facts found by the Immigration Authorities. This view cannot be supported. See Lindsey v. Dobra, 62 Fed. (2d) 116.

"From what has been said, it follows that the Writ of Habeas Corpus should be denied, and Petitioner remanded to the custody of the Immigration Authorities."

court's previous order and opinion herein, to which answer copies of the warrant, the order, and the opinion were exhibited.

The petitioner did not plead further, and he did not traverse the Government's return. This failure to tra- [fol. 48] verse the return disposed of the petition, and would have disposed of it were it an original petition also, for when Bellaskus did not traverse the answer to the writ he admitted that he was held, as it stated, under a regular warrant for deportation after a fair and legal hearing. *Crawley v. Christensen*, 137 U. S. 86, 94; *Brewster v. Villa*, 90 F. (2) 853, 854; *U. S. v. O'Brien*, 111 F. (2) 232, 234.

Nevertheless, the petitioner contends that the lower court committed error in not requiring a second production before it of the record of the hearing before the immigration officials, and contends further that all the issues raised were not heard. At the hearing, the petitioner was relying on three points: (1) His counsel insisted that the issuance of the warrant was arbitrary, capricious, and constituted an abuse of discretion; (2) that the warrant having been outstanding eleven years was *functus officio;* and (3) that since there was a finding of the petitioner's birth in Turkey, there was no legal authority to deport him to Greece.

The trial court placed the burden on the petitioner to challenge the Government's answer, and refused to consider any points except (2), that the warrant had become invalid by the passage of time. That point is abandoned here by appellant. No citation of authority is necessary to uphold the *prima facie* validity of the warrant in the total absence of proof that the delay was the fault of the officials. It seems actually to have benefitted the appellant in view of the numerous delays sought and obtained by him. [fol. 49] Petitioner's point (1) disposes of itself in the absence of any factual proof, and there was no offer of proof as to how or in what manner the abuse of discretion asserted came into being, nor what acts of the officials were arbitrary and capricious, nor how there was applied an erroneous construction of law.

The final point (3), that there was no authority to deport to Greece because of the finding of birth in Turkey, is one not open to judicial inquiry in the absence of a showing that the administrative agency having the legal responsibility

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of finding the facts has illegally done so. No suggestion has been made that the findings were illegally made. Under Section 156 of Title 8 U. S. C., the Congress recognized several factors in determining the place of destination of an alien on deportation. Birth is merely one of these factors. When the agency charged with the duty of finding the facts has done so, the place of destination among the optional places fixed by Congress is applied as a matter of law by the executive branch of the Government pursuant to the legislative command.

No reversible error appearing, the judgment is Affirmed.

SIBLEY, Circuit Judge, Dissenting:

When an alien is deported against his will, next to the question of his ejection from the United States, the most important one to him is the place to which he shall be sent. [fol. 50] The statute fixes that place thus: "The deportation of aliens provided for in this chapter shall, at the option of the Attorney General, be to the country whence they came or to the port at which such aliens embarked for the United States . . . or if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country and such country refuses to permit their reentry, or imposes conditions upon permitting reentry, then to the country of which such aliens are citizens or subjects, or to the country in which they resided prior to entering the country from which they entered the United States". 8 U. S. C. A. Sec. 156. The language is mandatory: "shall". The options are, 1. the country or port of departure for the United States; 2. if the country of departure disclaims the alien and blocks reentry, then the country of true citizenship; or 3. the country of last residence before entering the country of departure. It is not lawful to deport an alien to a country of which he is not now a citizen or subject and in which he has never resided and from which he did not depart to the United States. The question can be raised on habeas corpus, deserves serious consideration, and is to be answered by the political situation of the countries at the time of the hearing. *Mensevich vs. Tod, Commissioner*, 264 U. S. 134.

This question was not decided by Judge Kennerly in the habeas corpus hearing before him in 1939, and should not have been refused a hearing in the present case when raised for the first time. The strict rules of *res judicata* do not apply to habeas corpus. *Loisel vs. Salinger*, 265 U. S. 239; *Wong Doo vs. United States*, 265 U. S. 239. In-[fol. 51] deed the political situation of Turkey and Greece have changed greatly since 1909 when this alien departed for the United States, and even since 1935 when this warrant for deportation issued.

The sworn application for the writ states that in the deportation it was found as a fact that applicant was born in Turkey, that he immigrated into the United States from Turkey, and was a citizen and subject of Turkey, and alleged that he is not a citizen of Greece and has no relatives there, and has never been in Greece. The district judge did not order the writ to issue, and there was never a return to a writ to be traversed. There was only an unsworn answer to a show cause order and it made no denial of the facts just stated. The judge refused to have the deportation record produced, or to consider any question but whether by lapse of time the deportation warrant was stale. In this I think he erred. He was right in holding the order not stale, and in his discretion he could refuse to reexamine the questions decided by Judge Kennerly; but he should have enquired whether there was any lawful reason for sending Bellaskus to Greece where he was not born, is not a citizen or subject, and has never been. It is common knowledge that Greece is now in great want and turmoil, and is not a desirable place for an alien stranger to go.

[fol. 52] JUDGMENT

Extract from the Minutes of December 2, 1947

No. 11786

ALEXANDESUS BELLASKUS

versus

L. D. CROSSMAN, Officer in Charge, United States Immigration and Naturalization Service

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Sibley, Circuit Judge, dissents."

[fol. 53] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 15, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Petitioner pro se. File No. 52,761. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 10. Alexandesus Bellaskus, Petitioner, vs. L. D. Crossman, Officer in Charge, United States Immigration and Naturalization Service. Petition for writ of certiorari and exhibit thereto. Filed January 16, 1948. Term No. 10, O. T. 1948.

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JAN 10 1948

Supreme Court of the United States

OCTOBER TERM, 1947

No. [redacted] 10

ALEXANDESUS BELLASKUS, *Petitioner*,

v.

L. D. CROSSMAN, OFFICER IN CHARGE,
UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, Fifth Circuit, at New Orleans, Louisiana,

AND BRIEF IN SUPPORT THEREOF.

C. F. TUCKER,
313 Sterling Building,
Houston, Texas,
Counsel for Petitioner

ALPHA LAW PRINT CO., HOUSTON

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Supreme Court of the United States

OCTOBER TERM, 1947

No._____

ALEXANDESUS BELLASKUS, *Petitioner*,

v.

L. D. CROSSMAN, OFFICER IN CHARGE,
UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, Fifth Circuit, at New Orleans, Louisiana

---

TO THE HONORABLE, THE SUPREME COURT
OF THE UNITED STATES:

Comes now Alexandesus Bellaskus and respectfully files this petition and would respectfully show unto this Honorable Court:

A.

Summary Statement of the Matter Involved

The petitioner herein was born in Turkey, immigrated to the United States from Turkey and was lawfully admitted

to the United States on November 15, 1909, on a Turkish passport, and has remained in the United States continuously and uninterruptedly since that date and has no criminal record. Although the alien did not immigrate from Greece and has never been to Greece, he was ordered deported to Greece on October 25, 1935, for violation of Section 19 of the Immigration Act of February 5, 1917. The Immigration Inspector who conducted the hearing made a finding that the alien was a subject and citizen of Turkey. The alien filed application for a writ of habeas corpus in the United States District Court, Houston, Texas, on May 20, 1946, and alleged (1) that the warrant of deportation was functus officio; (2) that petitioner was not accorded a fair hearing by the Immigration Inspector; (3) that there was no evidence to sustain the warrant of deportation; (4) that the issuance of said warrant constituted an abuse of discretion, and that such action was arbitrary and capricious and that the immigration officials had applied an erroneous construction of law; and (5) that the finding of the Immigration Inspector that the alien was born in Turkey and was a citizen and subject of Turkey did not justify removal to Greece and there was no authority for such action.

The Court issued an order TO SHOW CAUSE, to produce the alien in court, and also a properly authenticated record in this case of the proceedings before the Immigration and Naturalization Service. The Government did not file any motion or answer in this cause of any nature until court had convened for the hearing of this matter, said answer having been filed after an adjournment (R. 24). Immediately after the filing of the unsworn answer to the Show Cause Order the Court proceeded to hear part of the matter in controversy and accordingly no opportunity was given counsel for the petitioner to file any further pleadings until his Honor had ruled upon the questions presented in the pe-

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tition for the writ. It is desired to emphasize that no writ of habeas corpus was issued by the Court and there was never a return made to the writ and therefore there was no pleading filed by the Government in this proceeding which could have been traversed. It developed at the hearing that the same alien had filed a petition for a writ of habeas corpus on December 2, 1939, which was dismissed by Hon. T. M. Kennerly, Senior Judge, in the Southern District of Texas (R. 14).

The only allegations contained in the prior petition for a writ were (1) that the alien was not accorded a fair hearing and (2) that there was not sufficient evidence to support the warrant. The trial judge in this subsequent hearing thereupon declined to require the production of the deportation record and refused to consider or HEAR evidence upon any questions but whether by lapse of time the deportation warrant was stale, and in this connection the record of the proceedings were at hand in court, in possession of an Immigration Inspector in attendance upon the trial. In other words, the trial court refused to accord this alien a hearing upon the new grounds raised in this subsequent petition which were (1) the issuance of said warrant constituted an abuse of discretion, and that such action was arbitrary and capricious and that the immigration officials had applied an erroneous construction of law and (2) that it was unlawful to deport the alien to Greece inasmuch as a finding had been made by the Immigration Inspector that he was a citizen of Turkey and had immigrated to the United States from Turkey and had never been to Greece. In this connection motion was made in open court that the record showing the proceedings before the Immigration Service be produced in open court (R. 29). The Court made the observation (R. 33). "The only point I want to hear anything on is the law with reference to the passage of time, and as to it being a bar to the enforcement of

the deportation." His Honor, after declining to require the production of the immigration record and limiting the scope of the hearing to the one point referred to and declining to HEAR any witnesses or evidence or decisions or arguments on the additional points raised in the petition for the writ of habeas corpus, remanded the petitioner to the custody of the Immigration Service for deportation to Greece, from which action appeal was made to the Circuit Court of Appeals, 5th Circuit, at New Orleans, La.

B.

The Circuit Court of Appeals in the majority opinion affirmed the decision of the District Court and in the majority opinion makes repeated reference to a judgment discharging a writ of habeas corpus and apparently basing its opinion upon the fact that the petitioner did not traverse the Government's return. No writ of habeas corpus was issued in this case and there was never a return to a writ to be traversed. As a matter of fact the hearing in this case was so brief that it was completely heard and disposed of a very short time after the Government had filed its unsworn answer to the show cause order.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 11,786, Alexandesus Bellaskus, Appellant, versus L. D. Crossman, Officer in Charge, United States Immigration and Naturalization Ser-

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vice, Appellee, and that the judgment of said Court may be here reversed, and that Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

ALEXANDESUS BELLASKUS,
Petitioner

By C. F. TUCKER,
Attorney for Petitioner,
313 Sterling Building,
Houston 2, Texas

Supreme Court of the United States

OCTOBER TERM, 1947

No._____

ALEXANDESUS BELLASKUS, *Petitioner*,

v.

L. D. CROSSMAN, OFFICER IN CHARGE,
UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Courts Below

(A) The Trial Court filed no memorandum or opinion.

(B) The opinion in the Circuit Court of Appeals, Fifth Circuit, is not yet officially reported. It is numbered 11,786 on the docket of that Court, styled Alexandesus Bellaskus, Appellant, versus L. D. Crossman, Officer in Charge, United States Immigration and Naturalization Service, Appellee, and is dated December 2, 1947. It appears on pages 45 to 51 of the record.

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II.

Jurisdiction

(A) Jurisdiction is vested in this Court to issue the writ applied for by virtue of the provisions of JUDICIAL CODE, Section 240, as amended by the Act of February 13, 1925, 43 Stats. 938.

(B) Application is made under the provisions of Rule 38, Section 5(b), RULES OF SUPREME COURT, UNITED STATES.

III.

Statement of the Case

A rather complete statement has already been made in the petition, which Petitioner adopts and makes a part of this brief.

IV.

Specifications of Error

(A) The Circuit Court of Appeals, Fifth Circuit, erred in holding that a writ of habeas corpus had been issued by the Trial Court and that it was mandatory upon the Petitioner to traverse the return to said writ.

(B) The Circuit Court of Appeals, Fifth Circuit, erred in holding that there was no offer of proof upon the points raised in the petition for writ.

(C) The Circuit Court of Appeals, Fifth Circuit, erred in holding that the executive branch of the Government may fix the place for the deportation of an alien, notwithstanding the legislative enactments limiting the place of deportation to those enumerated under Section 156 of Title 8, U. S. C.

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(D) The Circuit Court of Appeals, Fifth Circuit, erred in holding that in the United States an alien is not entitled to a hearing by a Judge of a United States District Court upon matters so very essential to his life, liberty and happiness, just because a Judge who heard a prior petition for a writ of habeas corpus declined to issue such a writ where the alien in the subsequent writ makes sworn allegations showing that he is entitled to his release and which matters were not heard or before the Court in the prior application.

V.

Argument

Point A

The record (R. 8), shows that the Trial Judge merely issued "an order to show cause" and no writ of habeas corpus was issued. In fact the order was to show cause why a writ of habeas corpus should not issue. Accordingly, there was no burden on the Petitioner to challenge the Government's answer. It was merely an unsworn general denial and it was not filed until midway in the proceedings and the hearing was concluded before any answer thereto could be filed. However, the Government merely prayed (R. 11) that respondent be discharged from the Court's order, and the attorney for the Petitioner would not know how to prepare a traverse to the said answer. The Petitioner in his application for a writ had set forth the reasons why he was being deprived of his liberty by deportation to Greece and alleged the invalidity of the deportation warrant. The Government, after announcing ready, and after an adjournment of Court, merely filed a motion to dismiss the petition and by its answer alleged that the warrant was valid. The issue before the Court was thereby joined and the matter proceeded to

trial. If as a matter of fact a writ of habeas corpus had been issued by the Court and a return filed thereto by the Government, the strict rule of pleading may have required that the Petitioner traverse the return. In this connection it is desired to respectfully invite the Court's attention to the fact that all of the allegations of the Petitioner are under oath. To deprive the Petitioner of a hearing in court when he is present with his attorney upon technical grounds of this nature seems to me to be a miscarriage of justice and to resort to these technical phases of pleading where the very life of a man is involved and to say that he was not entitled to a hearing in one of the courts of the United States of America seems to be depriving a man of his right to his life and liberty without due process of law. It is conceded that this may not have been an important matter to the Trial Judge, or to a very energetic and capable attorney for the Government, or for that matter to the attorney for the Petitioner, but when a man is in court contesting an order for his deportation to Greece, a country in which he has never lived, from which he did not immigrate, in which he has no relatives, and when such order requires that he be bodily removed from the United States, where he has lived for a continuous period of 38 years, or since he was a young man, a man who has never been arrested or charged with any violation of law in his life, then, gentlemen, it becomes an important matter to him, and I respectfully submit to this Honorable Court that such a man, despite he be a mere alien, is entitled to a HEARING before any Judge in this land.

Point B

The record (R. 29), and preceding pages of the transcript record shows that the Trial Court refused to require the production of the immigration record, although it was in court and that he declined to hear witnesses, evidence or ar-

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gument upon any point except as to whether the warrant of deportation, which was issued in 1935, had expired by operation of law. When counsel for Petitioner made a motion that the record be produced in court and endeavored to call witnesses to the stand and endeavored to argue the points raised in the petition for the writ, which had not previously been raised in the prior petition for a writ of habeas corpus, I respectfully submit that they exhausted every remedy that an attorney has in court and although they had made ample preparation to support the points raised in the petition, they could do nothing more than respectfully offer their evidence, decisions, and arguments, and when His Honor declined to hear the same, I know of no further action that could be taken by the attorney for the Petitioner except to appeal, and at this time it is the only remedy we have to appeal to the highest Court of the land, and to ask you gentlemen to require the District Court for the Southern District of Texas to accord this alien a hearing before he is placed on a ship and removed to a country of which he is not a citizen and I urge that before this man is forcibly deported from the United States, which is tantamount to a life sentence to him, that he be accorded a hearing in a Court of the United States, and I believe leaving the interest of the alien out of the matter entirely, that it is bad public policy to send an alien out of this country, who has been law abiding, to another land and permit him to go to that place and say that he was deported from this country without a hearing, and I submit that it is contrary to everything America stands for and that it is the greatest thing that has been preserved in this country and that it distinguishes this country from the judicial proceedings had in Russia and other countries, and it is why, gentlemen, that so many aliens seek to come to this country and I urge you to maintain that character of jurisprudence in the United States.

Point C

The statute fixes the place for deportation thusly: "The deportation of aliens provided for in this chapter shall, at the option of the Attorney General, be to the country whence they came or to the port at which such aliens embarked for the United States * * * or if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country and such country refuses to permit their reentry, or imposes conditions upon permitting reentry, then to the country of which such aliens are citizens or subjects, or to the country in which they resided prior to entering the country from which they entered the United States." 8 U. S. C. A., Sec. 156. The language is mandatory: "shall." The options are, 1. the country or port of departure for the United States; 2. if the country of departure disclaims the alien and blocks reentry, then the country of true citizenship; or 3. the country of last residence before entering the country of departure. It is not lawful to deport an alien to a country of which he is not now a citizen or subject and in which he has never resided and from which he did not depart to the United States. The question can be raised on habeas corpus, deserves serious consideration, and is to be answered by the political situation of the countries at the time of the hearing. MENSEVICH v. TODD, COMMISSIONER, 264 U.S. 134.

As stated by JUDGE SIBLEY in the dissenting opinion: "This question was not decided by Judge Kennerly in the habeas corpus hearing before him in 1939, and should not have been refused a hearing in the present case when raised for the first time. The strict rules of res judicata do not apply to habeas corpus."

The Supreme Court has repeatedly held that the place of deportation of an alien is subject to judicial review and that

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it is not entirely discretionary with the Attorney General or any of his subordinates. BLUMEN v. HAFF, 56 S. Ct. 248, 296 U.S. 644, and there are numerous circuit court decisions upon this subject. In this connection it had become a practice for the Government to deport to England during the war those aliens whose countries had set up temporary capitals in England, and the Courts all throughout the United States properly ruled that this was contrary to Section 156 of Title 8. The statute is plain upon this point and there can be no misconstruction of the same.

Point D

The strict rules of res judicata do not apply to habeas corpus. LOISEL v. SALINGER, 265 U.S. 239; WONG DOO v. UNITED STATES, 265 U.S. 239. It is our position that the rules of res judicata do not apply in this case even to the points that were raised in a prior petition for a writ before Judge Kennerly in 1939. To hold otherwise would deprive a Petitioner from taking advantage of decisions that have been rendered subsequently by our Supreme Court of the United States, or laws that have been passed by our Congress. Indeed, the fact that a petition for a writ of habeas corpus was denied in 1939 affords no basis for the position of a court saying in 1947, eight years later, that I will not hear this petition because it was heard eight years ago by another Judge, even upon the points raised in the prior petition.

During the interim which intervened in this case a World War has been fought, conditions in all countries were changed, the laws have been amended with reference to deportation and the conditions in all of the countries involved have undergone great changes and indeed decisions have been rendered all over the United States based upon these new

conditions. For the Court to take the position that I will not hear this case because it was heard eight years ago, seems to me, while quite complimentary to the Judge who heard the prior petition, to limit and restrict the use of a petition for a writ of habeas corpus more than was ever intended by the legislative branch of this Government, and it is respectfully submitted that if counsel can show at this time that the hearing was unfair or there was no evidence to support the warrant of deportation, or that the Department has applied an erroneous construction of law, that we would be entitled to have a writ issued. Indeed, the very least I believe the Petitioner is entitled to under the spirit of the laws in this country is a hearing and if there are decisions, such as STRENCH v. PEDARIS, 55 F. (2d) 597, C.C.A. 10th Cir., which hold that the warrant of deportation in this case is invalid, I think after a lapse of eight years from the previous petition that we should be able to show that to a Court and be heard. Furthermore, if the United States Department of Justice, since the previous writ was denied in 1939, has enunciated new rules and practices which do not require the deportation of an alien under the circumstances in this case, unless it is shown that he profited financially, I think we should be permitted to show that to a Court and to have a hearing. I as much as any attorney have the deepest and greatest respect for our courts, and particularly for our courts here in Houston, and the sanctity of such courts and for the preservation of the Court's time and energy, but the principle involved here far exceeds those considerations. Here, we have an alien in court about to be deported to a strange country. Certainly, no matter how busy the Court is, that alien is entitled to be heard by that Court, and in this case I think the sanctity of the law is above the sanctity of the Court.

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Conclusion

It is, therefore, respectfully submitted that the dissenting opinion of his Honor, JUDGE SIBLEY, enunciates the correct principle of law in this case and it is respectfully submitted that the main question presented to this Honorable Court is whether or not in the United States at this time an alien who avails himself of a petition for a writ of habeas corpus and presents himself in court, with a full record of the proceedings had before the immigration authorities available in court, is entitled to a HEARING and it is sincerely and honestly believed that this case is one calling for the exercise by this Court of its supervisory powers in order that the judgment of the Circuit Court of Appeals, Fifth Circuit, be reviewed and the case remanded to the trial court for trial in accordance with the principles of law, and to that end, a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals, Fifth Circuit, and finally reverse it.

Respectfully submitted,

By_____

C. F. TUCKER,
Counsel for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 531

ALEXANDESUS BELLASKUS, PETITIONER

v.

L. D. CROSSMAN, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 44–49) are reported at 164 F. 2d 412.

JURISDICTION

The judgment of the circuit court of appeals was entered December 2, 1947 (R. 50). The petition for a writ of certiorari was filed January 16, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner is an alien who has been ordered deported to Greece. In 1939 a full hearing was held on a petition for habeas corpus challenging the legality of the order, and the writ was dismissed. In his present habeas corpus petition, he tendered issues which had not been determined in the prior proceeding. The question is whether, in the circumstances of this case, petitioner is entitled to a hearing on such new matters.

STATUTES INVOLVED

Section 19 of the Act of February 5, 1917, c. 29, 39 Stat. 874, 889 (8 U. S. C. 155), as it read at the time of the issuance of the warrant of deportation, provided:

> * * * any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * * In every case where any person is ordered deported from the United States under the provisions of this Act, * * * the decision of the Secretary of Labor shall be final.

Section 20 of the same Act (8 U. S. C. 156), as it read at the time of the issuance of the warrant of deportation, provided:

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The deportation of aliens provided for in this Act shall, at the option of the Attorney General, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory; or, if such aliens entered foreign contiguous territory from the United States and later entered the United States, or, if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their reentry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States.

STATEMENT

On October 25, 1935, after a hearing before an immigration inspector, a warrant was issued by the Assistant to the Secretary of Labor ordering that petitioner be deported to Greece under Section 19 of the Immigration Act of February 5, 1917, upon a finding that he was an alien who was "managing a music and dance hall * * * habitually frequented by prostitutes" (R. 12–13).

On November 29, 1939,[1] petitioner filed in the District Court for the Southern District of Texas

[1] From 1935 to 1939, the Immigration and Naturalization Service, as appears from the files of that office, was endeavor-

a petition for a writ of habeas corpus in which he alleged that there was no evidence that he owned any interest in the dance hall, that he was not given a fair hearing by the immigration authorities, and that the evidence was insufficient to support the deportation warrant. The writ issued and a hearing was held at which the record of the hearing before the immigration inspector was introduced in evidence. The court (Kennerly, D. J.), after a careful examination of the record, found the allegations of the petition to be without substance. The writ was dismissed on December 5, 1939, and petitioner was remanded to the custody of the immigration authorities for deportation in accordance with the warrant. (R. 13–16.)

On May 20, 1946,[2] petitioner filed in the same district court another petition for a writ of habeas

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ing through the Department of State to obtain a passport for petitioner from the Greek Government. In August 1939 the Greek Government, after proof of petitioner's citizenship had been furnished to it, finally issued instructions to its consul in New Orleans to issue the passport. Petitioner was at liberty under bond during the intervening period.

[2] The files of the Immigration and Naturalization Service reveal that on December 21, 1939, after the dismissal of the first habeas corpus petition, petitioner was granted an extension of six months to dispose of his property. At the conclusion of that period, the Greek Consul at New Orleans was still unwilling to issue a passport. Since the Mediterranean was closed because of the war, the matter rested there until June 1945, when petitioner was ordered to surrender himself for deportation. He obtained a 90-day stay to file a motion to reopen the case, which motion was finally denied on March 29, 1946. When next ordered to surrender, he filed

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corpus, which gave rise to the present proceeding. Petitioner charged that the immigration authorities had taken him into custody and were about to remove him to New York for deportation to Greece. He repeated the allegations of the previous petition to the effect that he had not been accorded a fair hearing and that the evidence was insufficient to sustain the warrant. He also made the following new allegations: (1) that the immigration officers abused their discretion and erroneously construed the law in issuing the warrant;[3] (2) that the warrant, having been issued in 1935, had expired by operation of law; and (3) that, since the immigration inspector had made findings that petitioner was born in Turkey, immigrated from Turkey and was a citizen of Turkey, and since petitioner was not a citizen of Greece and had never been in Greece, he could not legally be deported to Greece. (R. 6–8.) No explanation was given as to why the new grounds had not been raised in the earlier petition; nor was any in-

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the habeas corpus petition involved in the present proceeding. The files also disclose that the Greek Ministry of Foreign Affairs has now instructed the Greek Embassy in Washington to issue a Greek passport to petitioner.

We have felt justified in referring to the files in order to explain the delays in effecting petitioner's deportation.

[3] We gather from the transcript of the hearing (R. 26–27) and from the present petition (Pet. 14) that the intent of this allegation was that petitioner could not legally be deported since there was no evidence that he had profited from the prostitution practiced by the women who frequented his dance hall.

dication given to the court that an earlier petition had been filed.

On the same day, the district court (Hannay, D. J.) issued an order to show cause directing the immigration authorities to produce petitioner and the certified record of his deportation hearing, and to "show cause" why the writ should not issue. The hearing was set for the following day. (R. 9.)

At the hearing on the following day, May 21, 1946, the Government produced petitioner and filed a motion to dismiss the petition on the ground that it failed to state any facts which would justify issuance of the writ. The Government also filed a return to the order to show cause setting forth the warrant of deportation and the proceedings on the 1939 habeas corpus petition before Judge Kennerly. (R. 10–16.) The Government's attorney stated that he did not have the certified copy of the deportation proceedings,[4] but he thought the court could proceed without it in view of the fact that Judge Kennerly had already reviewed the record and the matter was *res judicata* (R. 17–23). Judge Hannay stated that if he had known that Judge Kennerly had already reviewed the deportation record, he would not have ordered that record produced, and he re-

[4] The certified copy is kept in the Central Office of the Immigration and Naturalization Service in Philadelphia (see R. 29) and obviously could not have been produced in the habeas corpus court in Houston, Texas, in one day.

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fused petitioner's further motion to require the production of the certified record (R. 27–29). The court then refused to consider two of the new issues tendered, i. e., whether the Immigration Service had erroneously construed the law in petitioner's case (R. 26–27, 33), and whether his deportation to Greece, instead of to Turkey, was illegal (R. 25–26, 33, 35–36). So far as these matters were concerned, the court held that they should have been raised at the previous habeas corpus hearing and that it was foreclosed from further consideration of them by Judge Kennerly's action (R. 25, 26, 27, 29). Petitioner's attorneys made no attempt to show that the failure to raise these matters in the prior proceeding had been in good faith. The court, after hearing argument as to whether the deportation warrant had expired by lapse of time (R. 29–38), dismissed the writ, discharged the rule to show cause, and remanded petitioner to custody for deportation (R. 39–40).

On August 19, 1946,[5] petitioner filed a notice of appeal (R. 40–41). On the appeal, petitioner abandoned his contention that the warrant had expired, but he argued that the district court should have given him a hearing on the other two new allegations of his petition. The Circuit

[5] The files of the Immigration and Naturalization Service reveal that no immediate steps were taken to deport petitioner because his attorney had orally stated in court at the close of the habeas corpus hearing that an appeal would be taken.

Court of Appeals for the Fifth Circuit affirmed the order of the district court on the grounds that by not traversing the Government's return, petitioner admitted that he was held under a proper warrant, and that the petition stated no facts which would justify the issuance of the writ. (R. 44–48.) Judge Sibley dissented on the ground that sufficient facts had been alleged in the petition to justify a hearing as to whether deportation to Greece was proper (R. 48–49).

ARGUMENT

In essence, petitioner's contention in this Court is that his second habeas corpus petition raised two new issues in such a manner as to entitle him to a hearing, and that the doctrine of *res judicata* did not apply to his second habeas corpus petition (Pet. 8–14).

The first of the two new issues was that the immigration authorities had erroneously construed the law in ordering him deported when there was no evidence that he had profited from the prostitution practiced by the women who frequented his da..ce hall (R. 26–27; Pet. 14). But the petition did not raise this issue in such a manner as to call for a hearing. It stated no facts, but merely alleged that the immigration authorities had abused their discretion and erroneously construed the law (R. 7). Furthermore, even if the petition had alleged as a fact that petitioner had

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not profited from prostitution,[4] the rule of *Strench v. Pedaris*, 55 F. 2d 597 (C. C. A. 10), upon which petitioner relies (Pet. 14), would still not avail him. In that case, the circuit court of appeals held that an alien could not be deported as an "inmate of a house of prostitution" upon evidence which established only that his wife had practiced prostitution in a building which the alien owned and in which they had lived as man and wife. There was a vigorous dissent in the *Strench* case and the decision appears never to have been cited with approval. It clearly does not support petitioner, who was ordered deported for managing a dance hall frequented by prostitutes.

We think, however, with the dissenting judge below, that with regard to the second new issue tendered, the habeas corpus petition stated facts which, under ordinary circumstances, would have entitled petitioner to a hearing or at least to the production of the certified record of the deportation proceedings. The petition alleged that the immigration inspector had made findings that petitioner was born in Turkey, immigrated from Turkey and was a citizen of Turkey; it was further alleged that petitioner was not a citizen of Greece and had never been in Greece (R. 7). Section 20 of the Immigration Act of 1917 (*supra*, p. 3) provides that aliens may be deported (1) to

[4] The files of the Immigration and Naturalization Service show that there was no evidence that he had done so.

the country whence they came, or (2) to the foreign port at which they embarked for the United States, or (3) to the country of which they are citizens, or (4) to the country in which they last resided prior to entering the country from which they entered the United States. If the allegations of the petition were true, petitioner could not legally be deported to Greece.[7]

It remains then to be considered whether the district court was correct in refusing to hear petitioner on this point on the ground that his case had already been reviewed by Judge Kennerly. We think it is clear from the transcript of the hearing that the district court thought that the decision of Judge Kennerly was *res judicata*. In this the court was, of course, mistaken. However, we do not concede that the result reached was necessarily incorrect, for, as we have pointed out at length at pages 54–62 of the Brief for the Respondent in *Price* v. *Johnston*, No. 111, this Term, now pending before this Court, where successive applications for writs of habeas corpus are filed, the applicant must establish his good faith by explaining to the court why new matters urged were not presented in the original application. As has been noted above (*supra*, pp. 5–6, 7), petitioned did not attempt, either in his habeas corpus petition or at the hearing, to explain why the point of the

[7] Such an issue may properly be raised by petition for a writ of habeas corpus. *Mensevich* v. *Tod*, 264 U. S. 134.

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legality of his deportation to Greece, rather than to Turkey, had not been raised in his 1939 proceeding. We think the case is controlled by the decision of this Court in *Wong Doo* v. *United States*, 265 U. S. 239, which also involved a second petition for a writ of habeas corpus filed by an alien deportee. This Court, after ruling that the doctrine of *res judicata* is not applicable to habeas corpus proceedings, went on to say (265 U. S. at 241):

> * * * But it does not follow that the judgment should be reversed; for it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal. The only ground on which the order for deportation was assailed in the second petition had been set up in the first petition. The petitioner had full opportunity to offer proof of it at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time. If an alien whose deportation has been ordered can do what was attempted here, it

> is easy to see that he can postpone the execution of the order indefinitely. Here the execution already has been postponed almost four years.
>
> We conclude that the judgment was right, although a wrong reason was given for it. The delay resulting from the course pursued by the petitioner had been unreasonable; * * *

Furthermore, even if it should be thought that the district court should have heard and decided the legality of ordering petitioner's deportation to Greece in view of his allegations that he immigrated from Turkey and was a citizen of that country, not of Greece, a reversal and remand of the cause to the district court for a hearing on that question would only result in further delay and could not affect the ultimate result. We have examined the central office file of the Immigration and Naturalization Service which was certified and introduced in evidence at petitioner's 1939 habeas corpus proceeding to ascertain whether there is any substance in his present contention. That file reveals that the inspector who held the hearing made findings that petitioner, although a Greek by race, was a citizen of Turkey, and recommended deportation to Turkey. But when an attempt was made to obtain a Turkish passport, it was discovered that petitioner had been born in a portion of Turkey which was ceded to Greece after World War I, and under the provisions of the

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Treaty of Trianon he had become a citizen of Greece. The finding was therefore revised to show that petitioner was a citizen of Greece and he was ordered deported to that country.[6] If the certified copy of the deportation proceedings had been produced in response to the district court's order to show cause, it would have been made clear then that petitioner's allegations of fact were without substance and the court would have been required to dismiss the petition. We submit that he has been given every consideration over a period of thirteen years and there is now no reason for any further delay of his deportation.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOSEPH M. HOWARD,
Attorneys.

FEBRUARY 1948.

[6] We have made this file available to the Clerk of this Court. The pertinent documents are indicated by identifying slips.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 10

ALEXANDESUS BELLASKUS,* PETITIONER

v.

L. D. CROSSMAN, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 26-31) are reported at 164 F. 2d 412.

JURISDICTION

The judgment of the Court of Appeals was entered December 2, 1947 (R. 32). The petition

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* Petitioner's correct name is Alexandrus Bellasakus, the name by which he was know in the proceedings in the District Court (R. 3, 4, 6, 24) and in all prior proceedings (R. 8, 9, 10). The erroneous appellation "Alexandesus Bellaskus" first appeared in petitioner's notice of appeal from the judgment of the District Court (R. 25), and the error has survived in subsequent proceedings (R. i, 1, 11, 26, 32, 33).

for a writ of certiorari was filed January 16, 1948, and was granted March 15, 1948 (R. 33). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended (now 28 U.S.C. 1254(1)).

QUESTION PRESENTED

Petitioner is an alien who has been ordered deported to Greece. In 1939 a full hearing was held on a writ of habeas corpus in which the legality of the order was challenged on certain grounds, and the writ was dismissed. In his present habeas corpus petition, he tendered an issue which had not been determined in the prior proceeding, *viz.*, whether the immigration officials had authority to order him deported to a country of which, allegedly, he was not a citizen and in which he had never been. The question presented is whether the District Court erred in refusing to consider this issue on the ground that its consideration was foreclosed by the previous habeas corpus proceeding and petitioner's failure to raise it therein.

STATUTE INVOLVED

The Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 889-890, provided in pertinent part as of the time of the issuance of the warrant of deportation involved herein (October 25, 1935):[1]

> Sec. 19. * * * any alien who manages or is employed by, in, or in connection with any

[1] The only subsequent change in the relevant provisions has been the substitution of the Attorney General for the Secretary of Labor. See 8 U.S.C. (1946 ed.), 155(a), 156.

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house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * *. In every case where any person is ordered deported from the United States under the provisions of this Act, * * * the decision of the Secretary of Labor shall be final.

Sec. 20. The deportation of aliens provided for in this Act shall, at the option of the Secretary of Labor, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; * * * or if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their reentry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States. * * *

STATEMENT

On October 25, 1935, after a hearing before an immigrant inspector, a warrant was issued by the Assistant to the Secretary of Labor ordering that petitioner be deported to Greece pursuant to Section 19 of the Immigration Act of February 5, 1917, *supra*, upon a finding that he was an alien who had been found "managing a music and dance hall * * * habitually frequented by prostitutes and where prostitutes gather" (R. 8).

On November 29, 1939,[2] petitioner filed in the District Court for the Southern District of Texas a petition for a writ of habeas corpus in which he alleged that there was no evidence that he owned any interest in the dance hall, that he was not given a fair hearing by the immigration authorities, and that the evidence was insufficient to support the deportation warrant. The writ issued and a hearing was held at which the record of the hearing before the immigrant inspector was introduced in evidence. The court (Kennerly, D.J.), after "a careful examination of the record," found the allegations of the petition to be without substance. The writ was accordingly dismissed on December 5, 1939, and petitioner was remanded to the custody of the immigration authorities for deportation in accordance with the warrant. (R. 9-11.)

On May 20, 1946,[3] petitioner filed in the same District Court another petition for a writ of habeas

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[2] From 1936 to 1939, the Immigration and Naturalization Service, as appears from the files of that office, was endeavoring through the Department of State to obtain a passport for petitioner from the Greek Government. In April 1939 the Greek Government, after proof of petitioner's citizenship had been furnished to it, issued instructions to its Legation in Washington to issue a passport to petitioner, and in August 1939 the Greek Legation instructed the Greek Consul in New Orleans to issue the passport. Petitioner was at liberty under bond during the intervening period. See Appendix, *infra*, pp. 18-19. We refer to these files herein, though they are not part of the record, in order to explain the delays in effecting petitioner's deportation.

[3] The files of the Immigration and Naturalization Service reveal that on December 21, 1939, after the dismissal of the first habeas corpus petition, petitioner was granted an extension of six months to dispose of his property. At the conclusion of that period, the Greek Consul at New Orleans was still

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corpus (R. 4-5), which gave rise to the present proceeding. He alleged that the immigration authorities had taken him into custody and were about to remove him to New York for deportation to Greece. He repeated the allegations of the previous petition that he had not been accorded a fair hearing by the immigration authorities and that the evidence was insufficient to support the deportation warrant. He also made the following new allegations: (1) that the issuance of the warrant was "arbitrary and capricious," an "abuse of discretion," and the result of an "erroneous construction of Law";[4] (2) that the warrant, having been issued in 1935, had "expired by operation of law"; and (3) that, since the immigrant inspector had made findings that petitioner was born in Turkey, immigrated from Turkey, and was a citizen of Turkey, and since, allegedly, he was not a citizen

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unwilling to issue a passport. Since the Mediterranean was closed because of the war, the matter rested there until June 1945, when petitioner was ordered to surrender himself for deportation. He obtained two further stays of deportation in which to file a motion to reopen the case, which motion was finally denied on March 29, 1946. When finally taken into custody for deportation, he filed the habeas corpus petition involved in the present proceeding. See Appendix, *infra*, pp 20-21. The files also disclose that the Greek Ministry of Foreign Affairs has recently again instructed the Greek Embassy in Washington to issue a Greek passport to petitioner. See Appendix, *infra*, p. 22.

[4] The petition did not specify in what respect the immigration authorities had, allegedly, misconstrued the law in ordering petitioner deported. Nor was the nature of the alleged misconstruction developed at the hearing on the order to show cause why the writ should not issue, due to the ruling of the district judge that petitioner's failure to present this contention in the previous habeas corpus proceeding foreclosed his making it in the instant proceeding (R. 16).

of Greece and had never been in Greece, he could not legally be deported to Greece. No explanation was given as to why the new grounds had not been raised in the earlier habeas corpus proceeding, nor, in fact, was the earlier proceeding otherwise called to the court's attention.

On the same day, the District Court (Hannay, D.J.) issued an order "to show cause * * * why the Writ of Habeas Corpus should not issue," and a hearing was set for the following day. The order directed respondent to produce petitioner at the hearing, and also the record of the proceedings before the Immigration and Naturalization Service in petitioner's case. (R. 6.)

At the hearing on the following day, May 21, 1946, respondent produced petitioner (R. 12-13) and filed a motion to dismiss the petition on the ground that it alleged no facts justifying issuance of the writ, but merely conclusions of law (R. 6). Respondent also, "without waiving the foregoing motion to dismiss," filed a return to the show-cause order, stating that the deportation warrant "was issued following a full and fair hearing, held in accordance with law * * * before an authorized Immigrant Inspector, and at which hearing petitioner was represented by counsel * * * and was offered the opportunity to cross-examine any and all of the witnesses produced at said hearing; that at the conclusion of such hearing said officer found that petitioner is subject to deportation * * *" (R. 7). The return also called the court's attention to the 1939 habeas corpus proceeding be-

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fore Judge Kennerly (R. 7). Copies of the deportation warrant (R. 8) and the order and memorandum opinion of Judge Kennerly in the earlier proceeding (R. 9-11) were attached to the return as exhibits.

Counsel for respondent stated at the hearing that he did not have the record of the proceedings before the Immigration and Naturalization Service, the production of which had been directed by the show-cause order,[5] but that he thought the court could proceed without it in view of the fact that Judge Kennerly had already reviewed the record and the matter was *res judicata* (R. 12). Judge Hannay stated that if he had known that Judge Kennerly had already reviewed the deportation record, he would not have ordered it produced, and he refused petitioner's further motion to require its production (R. 16-17).

Judge Hannay refused to consider two of the new issues tendered, *i.e.*, whether the immigration authorities had erroneously construed the law in ordering petitioner's deportation (R. 16, 20), and whether his deportation to Greece, rather than to Turkey, was illegal (R. 15-16, 20, 21-22). So far as these matters were concerned, the court held that even though they had not been raised in the previous habeas corpus proceeding, they "should have been raised" and that consideration of

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[5] This record was kept in the Central Office of the Immigration and Naturalization Service in Philadelphia (see R. 17-18) and obviously, as observed by the court below (R. 28), could not have been produced in the habeas corpus court in Houston, Texas, on one day's notice.

them in the second proceeding was foreclosed by Judge Kennerly's action (R. 15, 16, 17-18). Petitioner's attorneys made no attempt to show why these matters had not been raised in the prior proceeding. The court, after hearing argument as to whether the deportation warrant had expired by lapse of time (R. 18-23), discharged the rule to show cause, dismissed the petition for the writ,[6] and remanded petitioner to custody for deportation (R. 24).

On appeal to the Court of Appeals for the Fifth Circuit, petitioner abandoned his contention that the warrant had expired by lapse of time (R. 29), but contended that the District Court erred in not giving him a hearing on the other two new allegations of his petition. In affirming the order of the District Court, the majority of the Court of Appeals said that the District Court had properly refused to consider the first of those grounds because petitioner had presented neither proof nor offer of proof "as to how or in what manner the abuse of discretion asserted came into being, nor what acts of the officials were arbitrary and capricious, nor how there was applied an erroneous construction of law" (R. 29). In respect of the other asserted ground—which the majority opinion referred to as an alleged lack of "authority to deport to Greece because of the finding of birth

[6] The court's order referred to the "writ" as being dismissed (R. 24), but this was evidently an inadvertence (cf. the title of the order, R. 24), since, strictly speaking, no writ had issued, though the order to show cause had, somewhat unusually, directed petitioner's production at the hearing (R. 6).

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in Turkey"—the majority said that under Section 20 of the Immigration Act (*supra*, p. 3), "Congress recognized several factors in determining the place of destination of an alien on deportation. Birth is merely one of these factors" (R. 29-30).

In a dissenting opinion, Judge Sibley pointed out that the optional destinations to which, under Section 20, an alien may be ordered deported are limited, and that "It is not lawful to deport an alien to a country of which he is not now a citizen or subject and in which he has never resided and from which he did not depart to the United States" (R. 30). Consequently, he said, the District Court "should have enquired whether there was any lawful reason for sending Bellaskus to Greece where he was not born, is not a citizen or subject, and has never been" (R. 31).

SUMMARY OF ARGUMENT

The second habeas corpus petition, in challenging the authority to deport to Greece, rather than to Turkey, presented an issue cognizable on habeas corpus. *Mensevich* v. *Tod*, 264 U. S. 134. The District Court erred in refusing to consider this issue on the ground of *res judicata*, since that principle has no application in habeas corpus. *Salinger* v. *Loisel*, 265 U. S. 224. Nor could it properly have given "controlling weight" to the prior refusal to discharge on habeas corpus *id.*, at 230-231), since this issue had not previously been raised. And since the respondent did not specifically make the contention below that petitioner was abusing the writ by raising that issue in the present proceeding

without a showing as to why he had not raised it in his first petition for the writ, the court could not properly have refused to consider the issue on that ground. *Price* v. *Johnston*, 334 U. S. 266.

The files of the Immigration and Naturalization Service show that the reason for ordering petitioner's deportation to Greece, though admittedly he was born in Turkey and was originally a citizen of that country, was because the place of his birth had been ceded to Greece after World War I and, under the terms of a treaty between Greece and Turkey, he had acquired Greek nationality. But since those files were not produced in evidence and were not considered by the courts below, we believe that orderly judicial procedure requires these facts to be developed at a new hearing in the District Court (cf. *Bates* v. *United States*, 323 U.S. 15, 17), provided that petitioner can establish his right to raise the issue after having failed to do so in the first habeas corpus proceeding in 1939.

ARGUMENT

The Judgment of the Court of Appeals Should be Reversed and the Cause Remanded to the District Court for Further Proceedings.

In respect of the allegation of the second habeas corpus petition whereby petitioner challenged the authority of the immigration officials to deport him to Greece rather than to Turkey, the majority of the Court of Appeals, as we have indicated *supra*, p. 9), seem to have assumed that petitioner's contention was merely that he could not be deported to Greece because he was not

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born in that country. If this had been all there was to the allegation, we would, of course, agree with the majority below that no hearing was required on that issue, since the place of birth is not made a factor in determining a deported alien's destination under Section 20 of the Immigration Act.[7] But petitioner had alleged that the immigrant inspector had made findings that he was born in Turkey, immigrated from Turkey, and was a citizen of Turkey, and had further alleged that he was not a citizen of Greece and had never been in Greece (*supra*, pp. 5-6). If these allegations were true, there was no authority to deport petitioner to Greece, and the issue could properly be raised by habeas corpus. *Mensevich* v. *Tod*, 264 U. S. 134. For under Section 20, as pointed out by the dissenting judge (R. 30), the optional destinations of a deported alien are three: (1) the country or port of departure to the United States; (2) the country of which the alien is a citizen or subject; or (3) the country of last residence before entering the country of departure (the latter two optional destinations being permissible only where the first is ruled out for the reasons stated in the section, *viz.*, a holding by the country of departure that the alien is not a citizen or subject of that country and its refusal to permit reentry or the imposition of

[7] For this reason, the majority below, in stating that the place of birth is "one of [the] factors" in determining the deported alien's destination (R. 30), were also mistaken, except, of course, in so far as the place of birth might determine the country of citizenship.

any condition upon permitting reentry). Greece could have been none of such countries if petitioner's allegations were true. Consequently, it would have been error for the District Court to have refused consideration of this ground if the habeas corpus proceeding below had been the first instituted by petitioner.

It remains then to be considered whether the District Court was correct in refusing to hear petitioner on this point on the ground that his case had already been reviewed by Judge Kennerly. We think it is clear from the transcript of the hearing that the District Court thought that the decision of Judge Kennerly was *res judicata* on this issue (see pp. 7-8, *supra*). In this the court was, of course, mistaken, since it is well settled that the principle of *res judicata* does not strictly apply in habeas corpus proceedings. *Salinger* v. *Loisel,* 265 U. S. 224, 230. It is true that while *res judicata* has no strict application in habeas corpus proceedings, "controlling weight" may be given in a second habeas corpus proceeding to "a prior refusal to discharge on a like application." *Salinger* v. *Loisel, supra,* at 230-231; *Wong Doo* v. *United States,* 265 U. S. 239. And §2244 of Title 28 of the United States Code, as recently revised by Congress (Public No. 773, approved June 25, 1948, c. 646, sec. 1, 80th Cong., 2d sess.), enacts this rule into statutory form.[8] But even this rule could not properly have

[8] §2244 provides: "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment

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been invoked by the District Court, since the issue of the legality of petitioner's deportation to Greece had not previously been raised. *Price v. Johnston*, 334 U. S. 266, 289.[9]

In our brief in opposition to the granting of certiorari in the instant case, we conceded that the district judge erred in basing his decision on the principle of *res judicata*, but argued that, notwithstanding the erroneous ground on which the decision was predicated, the decision itself was correct. We urged that "where successive applications for writs of habeas corpus are filed, the applicant must establish his good faith by explaining to the court why new matters urged were not presented in the original application," and pointed out that petitioner "did not attempt, either in his [second] habeas corpus petition or at the hearing, to explain

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of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

[9] "There has thus been no proper occasion prior to the fourth proceeding for a hearing and determination by the District Court as to the allegation that the prosecution knowingly used false testimony to obtain a conviction. That fact renders inapplicable *Salinger* v. *Loisel*, 265 U. S. 224, upon which reliance was placed by the Circuit Court of Appeals. It was there held that, while *habeas corpus* proceedings are free from the *res judicata* principle, a prior refusal to discharge the prisoner is not without bearing or weight when a later *habeas corpus* application raising the same issues is considered. But here the three prior applications did not raise the issue now under consideration and the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition."

why the point of the legality of his deportation to Greece, rather than to Turkey, had not been raised in his 1939 proceeding" (pp. 10-11). In making this argument, we adopted by reference the similar argument advanced in our brief in *Price* v. *Johnston*, No. 111, last Term, which was then pending before the Court. Since then, however, the *Price* case has been decided, 334 U. S. 266, and the opinion of the Court outlined the appropriate procedure whereby a charge that the writ of habeas corpus is being abused should be made and the issue determined. The Court said that the burden rests on the respondent in the first instance to make the claim of an abuse of the writ with clarity and particularity in the return to the order to show cause. Once the claim is made, the burden of answering the allegation and of proving that he has not abused the writ rests on the petitioner. If the answer is inadequate, the court may dismiss the petition without further proceedings. But if there is a substantial conflict, a hearing may be necessary to determine the actual facts, and appropriate findings and conclusions of law can then be made. (334 U. S., at 291-292.)[10]

Since no specific claim of an abuse of the writ was made by respondent below and no such proce-

[10] The fact that the petitioner in a habeas corpus proceeding is often a prisoner unlearned in the law and unrepresented by counsel seems to have had some influence on the Court's ruling that he does not have the burden in the first instance of negating abuse of the writ in a successive application and substantiating the denial (334 U. S. 266, 291-292), but we do not understand that the procedure outlined was intended to be limited to such situations.

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dure as that outlined above was followed, we withdraw our reliance on petitioner's failure to explain to the District Court why his contention in respect of the legality of his deportation to Greece had not been made in the previous proceeding, and concede that the District Court erred in refusing to consider this ground.

We pointed out in our brief in opposition to the granting of certiorari in this case (pp. 12-13) that according to the central office file of the Immigration and Naturalization Service, which was introduced in evidence at petitioner's 1939 habeas corpus proceeding, the inspector who held the hearing made findings that petitioner, although a Greek by race, was a citizen of Turkey, and recommended deportation to Turkey; that when an attempt was made to obtain a Turkish passport, it was discovered that petitioner had been born in a portion of Turkey which was ceded to Greece after World War I, and under the provisions of a treaty between Greece and Turkey he had become a citizen of Greece; and that the finding was in consequence revised to show that petitioner was a citizen of Greece, to which country he was then ordered deported. See Appendix, *infra,* pp. 17-18. Accordingly, we stated, if petitioner's deportation record had been produced in response to the District Court's order to show cause in the instant habeas corpus proceeding, it would have become apparent that petitioner's allegations of fact were without substance in this respect. But since the deporta-

tion record was not in fact produced and is not a part of the official record in this case, we think that orderly judicial procedure requires that the above-mentioned facts should be developed at a new hearing before the District Court (cf. *Bates* v. *United States,* 323 U.S. 15, 17), assuming, of course, that petitioner can establish his right to raise this issue after having failed to raise it in the 1939 proceeding.

CONCLUSION

For the foregoing reasons, respondent suggests that the judgment of the Court of Appeals should be reversed and the cause remanded to the District Court with directions to vacate its order discharging the rule to show cause and dismissing the petition for a writ of habeas corpus. It is further suggested that, pursuant to the procedure set forth in *Price* v. *Johnston,* 334 U. S. 266, 293-294, respondent should be free to request the court to require petitioner to show cause why the new matter presented in the second habeas corpus petition was not raised in the first proceeding.

Respectfully submitted.

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APPENDIX

The following chronological summary of the history of petitioner's deportation proceeding, taken from the central office file of the Immigration and Naturalization Service, is presented in order to explain the delays in effecting his deportation:

June 28, 1935: Warrant of arrest issued.

July 25, 26, 31, 1935: Hearing before immigrant inspector.

July 31, 1935: Immigrant inspector recommends deportation to Turkey, "the country whence [petitioner] came and of which he is a citizen."

August 23, 1935: Recommendation approved by Galveston District Director, Immigration and Naturalization Service.

September 19, 1935: Turkish Consul in New York refuses to issue passport because "this man is subject to the exchange of population provided for in the Treaty of Trianon" [11] and "must be considered a citizen of Greece."

September 23, 1935: Galveston District Director revises recommendation so as to make Greece the country of destination.

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[11] The Turkish Consul was in error in referring to the Treaty of Trianon. That treaty, signed on June 4, 1920, was between the Allied and Associated Powers and Hungary. *Encyclopaedia Britannica*, "Trianon, Treaty of." As subsequent developments in petitioner's deportation proceeding made clear (see *infra*, p. 19), the diplomatic instrument to which the Turkish Consul had reference was the Convention Concerning the Exchange of Greek and Turkish Populations, signed at Lausanne on January 30, 1923, and constituting one of 17 diplomatic instruments signed at the Conference of Lausanne (November 20, 1922, to July 24, 1923) between Turkey and the Governments of Great Britain, France, Italy, Japan, Greece, Bulgaria, and Yugoslavia. *Id.*, "Lausanne, Conference of"; 18 Am. J. Int. L., Supp., pp. 84-90.

October 10, 1935: Chairman of the Board of Review recommends deportation to Greece; recommendation concurred in by Deputy Commissioner.

October 25, 1935: Warrant of deportation to Greece issued.

December 2, 1935: Request to reopen deportation proceeding filed.

December 11, 1935: Request denied.

April 8, 1936: Secretary of State requested to negotiate with Greek Government, through American Legation in Athens, "with a view to having the Greek Legation in Washington instructed to issue the desired passport facilities" to petitioner.

April 1936-April 1937: Correspondence between State and Labor Departments, and State Department and American Minister at Athens, reflecting efforts of Greek Government to verify fact of petitioner's Greek citizenship.

May 25, 1937: Greek Foreign Office advises American Minister at Athens that efforts to trace petitioner's brother in the village of Cassandra have been in vain, and requests "more precise information regarding the proposed deportee."

June 29, 1937: Above advice and request forwarded to Labor Department by Secretary of State.

August 12, 1937: Petitioner interviewed for supplementary statement regarding his birthplace and citizenship.

August 23, 1937: Supplementary statement sent to State Department.

September 1937-January 1939: Correspondence between State and Labor Departments, and State Department and American diplomatic representatives in Greece and Turkey, reflecting further ef-

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forts by Greek and Turkish authorities to trace petitioner and verify his citizenship status.

March 8, 1939: Turkish Ministry of Foreign Affairs reports that one "Alexandrus Ballakis," a native of Turkey who departed from that country in 1912, "acquires the status of exchangeable according to Article 1 of the Convention on the exchange of Greek and Turkish populations, and loses his Turkish nationality by birth in accordance with Article 7 of the above Convention." [12]

April 17, 1939: Secretary of State advised by American Minister at Athens that the Greek Legation at Washington has been instructed to issue a passport to petitioner.

August 2 and 7, 1939: Greek Legation at Washington instructs Greek Consul in New Orleans to issue a passport to petitioner.

August 26, 1939: Greek Consul in New Orleans advises New Orleans District Director that, inasmuch as petitioner "was born in a part of Greece which was then part of Turkey" and had "never taken an oath of Greek citizenship," petitioner should be presented at the Consulate for administration of such oath, following which he, the Consul, would "communicate with the Greek Legation regarding the issuance of a passport."

September 1, 1939: Another request to reopen deportation proceeding filed.

November 16, 1939: Request denied.

November 24, 1939: Authority granted to convey petitioner to Greek Consulate in New Orleans for taking oath.

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[12] The terms of this Convention appear at 18 Am. J. Int. L., Supp., pp. 84-90. See note 11, *supra*, p. 17.

November 29, 1939: First habeas corpus petition filed.

December 5, 1939: Writ dismissed.

December 9, 1939: Request made that deportation be deferred for six months to give petitioner an opportunity to close his business affairs.

December 21, 1939: Six-month deferment granted.

June 18, 1940: Instructions issued to convey petitioner to New Orleans at termination of deferment period, after ascertaining that a person competent to issue passports is available at Greek Consulate in that city (there having been a report that the Consul was in Greece).

September 12, 1940: Case permitted to rest for time being due to impossibility of effecting deportation on account of closing of Mediterranean.

October 16, 1940: Instruction to convey petitioner to New Orleans for taking of oath reissued, in view of fact that deportation to Greece "now is possible, at least via New York."

October 21-23, 1940: Petitioner goes to New Orleans at his own expense: in view of fact that "some questions" arise as to his "exchangeability" and his "refusal to sign the necessary petition," Consulate declines to issue passport and refers matter to Greek Legation in Washington for further instructions.

October 1940-June 1945: Further efforts to effect deportation interrupted, due, apparently, to difficulties encountered in obtaining passport and to impossibility of carrying out deportation in consequence of World War II; two additional requests to reopen deportation proceeding denied during

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this period, on January 11, 1943, and August 7, 1943.

June 8, 1945: Instructions issued that petitioner be called on to surrender for deportation.

June 14, 1945: Greek Consulate in New Orleans, asked if it is prepared to issue passport to petitioner, replies that it is not now authorized to issue passports to Greek subjects and that applications should be made to Greek authorities in Washington.

July 24, 1945: Stay of deportation requested to permit filing of new motion to reopen deportation proceeding.

August 17, 1945 (*circa*): 90-day stay of deportation granted.

January 25, 1946: At request of newly-retained attorney, further stay of 15 days granted.

February 12, 1946: Motion to reopen deportation proceeding filed.

March 29, 1946: Motion to reopen denied.

May 20, 1946: Petitioner taken into custody for deportation; second (instant) habeas corpus petition filed.

May 21, 1946: Petition for writ dismissed; intention to appeal announced orally in open court; notice of appeal not filed until August 19, 1946.

July 19, 1946: Greek Consul in New York advises that since petitioner was born in Turkey and has no documentary evidence of Greek citizenship, he is not considered a Greek citizen and cannot be given a passport.

July 26, 1946: Commissioner of Immigration and Naturalization advises Secretary of State that, despite Greek Government's instruction to Greek Legation in Washington to issue a passport

to petitioner (see under April 17, 1939, *supra*, p. 19), "all efforts of this Service to secure a passport have failed," and requests that "the matter be presented to the Greek Legation with a request for the issuance of a passport" for the purpose of effecting petitioner's deportation.

November 25, 1946: American Ambassador at Athens informs Secretary of State that "The Greek Ministry for Foreign Affairs has informed this office that the subject is entitled to a Greek passport and that appropriate instructions are being sent to the Greek Embassy, Washington, to issue the passport."

December 17, 1946: Secretary of State transmits foregoing advice to the Immigration and Naturalization Service.

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Per Curiam Decision.

No. 10. BELLASKUS *v.* CROSSMAN, OFFICER IN CHARGE, U. S. IMMIGRATION & NATURALIZATION SERVICE. Certiorari, 333 U. S. 852, to the United States Court of Appeals for the Fifth Circuit. Argued October 13, 1948. Decided October 18, 1948. *Per Curiam:* Upon suggestion of the Solicitor General and consideration of the record, the judgment of the Court of Appeals is reversed and the cause is remanded to the District Court with directions to vacate its order discharging the rule to show cause and dismissing the petition for a writ of habeas corpus. Peti-

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tioner submitted on brief *pro se*. *Philip R. Monahan* argued the cause for respondent. With him on the brief were *Solicitor General Perlman* and *Robert S. Erdahl*. Reported below: 164 F. 2d 412.